

1 NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP  
2 JOHN J. FLYNN III (SBN 76419)  
3 CAROLLYN B. LOBELL (SBN 209933)  
4 ROBERT C. HORTON (SBN 235187)  
5 18101 Von Karman, Suite 1800  
6 Irvine, California 92612-0177  
7 Telephone: (949) 833-7800  
8 Facsimile: (949) 833-7878

9 Attorneys for Petitioner, California Transportation Ventures, Inc.

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

BEFORE THE CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of California Regional Water Quality)  
Control Board, San Diego Region, )  
Notice of Violation No. R9-2007-0090 and )  
Investigative Order No. R9-2007-0092, )

CALIFORNIA TRANSPORTATION  
VENTURES, INC., GENERAL PARTNER OF  
SOUTH BAY EXPRESSWAY, L.P.

Petitioner.

**PETITION TO THE STATE WATER  
RESOURCES CONTROL BOARD  
PURSUANT TO WATER CODE SECTION  
13320 AND 23 CAL. CODE REGS.  
SECTION 2050 FROM A NOTICE OF  
VIOLATION AND INVESTIGATIVE ORDER  
ISSUED BY THE CALIFORNIA REGIONAL  
WATER QUALITY CONTROL BOARD, SAN  
DIEGO REGION; MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT  
THEREOF**

**[DECLARATION OF DAVID HAWLEY  
FILED CONCURRENTLY HEREWITH]**

**[REQUEST FOR STAY FILED  
CONCURRENTLY HEREWITH]**

## TABLE OF CONTENTS

	<u>(Page)</u>
1. NAME AND ADDRESS OF PETITIONER: .....	1
2. SPECIFIC ACTION OR INACTION OF THE REGIONAL WATER BOARD THAT THE STATE WATER BOARD IS REQUESTED TO REVIEW: .....	1
3. DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT: .....	1
4. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER: .....	1
5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED: .....	2
6. THE SPECIFIC ACTION THE PETITIONERS REQUEST: .....	2
7. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN PETITION: .....	2
8. A COPY TO THE REGIONAL BOARD: .....	3
9. EXPLANATION OF WHY THE PETITIONER WAS UNABLE TO RAISE THESE SUBSTANTIVE ISSUES OR OBJECTIONS BEFORE THE REGIONAL BOARD .....	3
10. REQUEST FOR PREPARATION OF THE RECORD: .....	3
1. INTRODUCTION AND PRELIMINARY STATEMENT .....	1
2. STATEMENT OF FACTS .....	3
A. Background: The SR 125/South Bay Expressway. ....	3
B. The Present Controversy.....	4
3. ARGUMENT AND LEGAL ANALYSIS .....	8
A. The Notice of Violation Is Unsupported by the Facts. ....	8
B. The Notice of Violation Works an Unlawful Revocation and Reissuance of the Special Condition in Violation of Law and CTV's Right to Notice And a Hearing.....	10
C. The Investigative Order Is Unsupported by the Facts and Unlawfully Attempts to Impose Further Special Conditions on Caltrans and CTV.....	12

TABLE OF CONTENTS (cont'd)

(Page)

1.	Because Caltrans Has Not Violated Its Obligation to Promote and Pursue a Regional Aerial Deposition Study, the Investigative Order Has No Factual Basis.....	12
2.	To Opt for the Alternative Form of Compliance in the Investigative Order Would Violate the Special Condition and Subject Caltrans and CTV to Penalties Under the NOV.....	13
3.	The Regional Study Required by The Investigative Order Attempts to Unlawfully Amend the 401 Certification.....	13
4.	The Regional Board Cannot Seek to Retroactively Amend the 401 Certification to Impose Additional Requirements by Way of the So-Called Alternative Form of Compliance in the Investigative Order. ....	15
5.	Caltrans and CTV Cannot Opt for the Alternative Form of Compliance Because It Does Not Define “Partnership” With Sweetwater Authority and U.S.G.S. ....	16
6.	The Investigative Order and NOV Appear to be Pretextual, and Should be Revoked to Avoid the Appearance of Bias.....	16
D.	None of the Sections of the California Water Code Cited in Support of the Investigative Order Authorizes the Regional Board to Require Caltrans or CTV to Design, Fund, and Implement a Regional Aerial Deposition Study.....	18
1.	Section 13267, subd. (b) Does Not Authorize the Regional Board to Issue the Investigative Order. ....	18
a)	Neither Caltrans nor CTV is a Discharger of Aerial Pollutants Into Sweetwater Reservoir, thus, Section 13267, subd. (b) of the Water Code Does Not Authorize the Regional Board to Issue the Investigative Order. ....	18
b)	Interpreting “Discharge of Waste” in Section 13267, subdivision (b) to Include Direct Aerial Deposition of Air Pollutants Allows for Arbitrary and Inconsistent Regional Regulation.....	19
c)	The Plain Language of Section 13267, subdivision (b) Does Not Authorize the Regional Board to Require Air Quality Studies.....	20

TABLE OF CONTENTS (cont'd)

(Page)

d)	The Regional Board Has Not Shown That the Burdens and Costs of the Proposed Caltrans/CTV Study Bear a Reasonable Relationship to the Benefits as Required by Section 13267, subdivision (b). ....	21
2.	The Meaning of “Discharge of Waste” for Purposes of Water Code Section 13383, Subdivision (a) Does Not Include Direct Aerial Deposition of Air Pollutants Because Aerial Deposition Is a Nonpoint Source of Waste. ....	25
3.	Water Code Section 13225, subdivision (c) does not Authorize the Regional Board to Issue the Investigative Order. ....	26
a)	Water Code Section 13225, subdivision (c) does not Authorize the Regional Board to Require Private Entities such as CTV to Conduct Aerial Deposition Studies. ....	26
b)	The Regional Board Has Not Shown That the Burdens and Costs of the Proposed Caltrans/CTV Study Bear a Reasonable Relationship to the Need and Expected Benefits as Required by Section 13225, subdivision (c). ....	26
4.	Only an Act of the Legislature Could Authorize Regional Boards to Require Studies of Aerial Deposition. ....	27
4.	CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases

*Defenders of Wildlife v. U.S. Environmental Protection Agency* (10th Cir. 2005)

415 F.3d ..... 25

*Lake Madrone Water District v. State Water Resources Control Board* (1989)

209 Cal. App. 3d 163 ..... 25

Statutes

33 U.S.C. § 1341(a)(3)..... 11

33 U.S.C. § 1362(12)(A)..... 25

33 U.S.C. § 1362(14) ..... 25

Health & Saf. Code, § 39002 ..... 23

Health & Saf. Code, § 39658 ..... 23

Health & Saf. Code, § 39667 ..... 23

Sts. & Hy. Code, § 143 ..... 4

Wat. Code, § 13267, subd. (a) ..... 20

Wat. Code, § 13225, subd. (c) ..... passim

Wat. Code, § 13263.3, subd. (d)(3)(B) ..... 27

Wat. Code, § 13267, subd. (b)(1)..... passim

Wat. Code, § 13370, subd. (a) ..... 25

Wat. Code, § 13373 ..... 25

Wat. Code, section 13383, subd. (a) ..... passim

Wat. Code section 13320, subd. (a) ..... 3

Wat. Code, § 13267 ..... 20

TABLE OF AUTHORITIES (cont'd)

(Page)

**Other Authorities**

State Water Resources Control Board, Regional Water Quality Control Boards  
and California Coastal Commission,

*Annual Progress Report for Federal Clean Water Act Section 319 Program, July 2005 through June  
2006, April 2007* ..... 20

US EPA, *Frequently Asked Questions About Atmospheric Deposition: A Handbook For Watershed  
Managers*, EPA-453/R-01-009 (September 2001) ..... 19

**State Water Resources Control Board Policy**

SWRCB Policy No. 92-49 ..... 23, 25

1 **1. NAME AND ADDRESS OF PETITIONER:**

2 California Transportation Ventures, Inc., General Partner of South Bay Expressway, L.P.<sup>1</sup>  
3 1129 La Media Road, San Diego, CA 92154.

4 Telephone: (619) 710-4000

5 Facsimile: (619) 710-4097

6 **2. SPECIFIC ACTION OR INACTION OF THE REGIONAL WATER BOARD THAT**  
7 **THE STATE WATER BOARD IS REQUESTED TO REVIEW:**

8 California Transportation Ventures, Inc. (referred to as "Petitioner" or "CTV" for convenience)  
9 brings this petition to request review and reversal of the **Notice of Violation No. R9-2007-0090**  
10 **("NOV")** and **Investigative Order No. R9-2007-0092**, both dated June 1, 2007, issued by John H.  
11 Robertus, Executive Officer of the California Regional Water Quality Control Board, San Diego Region  
12 (the "Regional Board").<sup>2</sup>

13  
14 **3. DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT:**

15 June 1, 2007.

16  
17 **4. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR**  
18 **FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:**

19 See CTV's Memorandum of Points and Authorities below and incorporated by reference as if  
20 restated here in full.

21  
22 <sup>1</sup> California Transportation Ventures, Inc. is the general partner of South Bay Expressway, L.P.  
23 Documents in the record in this petition sometimes refer to California Transportation Ventures, Inc. as  
24 "CTV," and South Bay Expressway, L.P. as "SBX." For the sake of convenience, we refer to Petitioner  
25 South Bay Expressway, L.P. as "CTV."

26 <sup>2</sup> The NOV and IO allege a violation of the Clean Water Act section 401 Water Quality Certification  
27 No. 99C-133 for discharge of dredged and/or fill materials for State Route 125 South Toll Road, dated  
28 April 23, 2001 ("401 Certification" attached hereto as Exhibit A and incorporated by reference herein.)  
A copy of the NOV, the Investigative Order, and a Letter from John H. Robertus to Caltrans and South  
Bay Expressway/CTV re: Violation of Clean Water Act § 401 Water Quality Certification No. 99C-133  
For The South Bay Expressway (SR-125 South) (the "Violation Letter") are attached as Exhibits B, C  
and D, respectively, and incorporated by reference herein.

1 CTV has combined the statement of reasons for the petition with the points and authorities in  
2 support of the legal issues raised in the petition for the sake of administrative economy and coherence.  
3

4 **5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED:**

5 Petitioner CTV is a party to whom the NOV and Investigative Order are directed, thus CTV is  
6 subject to fines of between \$100 and \$5,000 per day and other penalties if Caltrans fails to comply with  
7 the Investigative Order on or before September 1, 2007.

8 A more detailed statement of the manner in which CTV is aggrieved is included in the  
9 declaration of Mr. David Hawley, CTV Executive Vice President – Construction for the SR 125 or  
10 South Bay Expressway Project attached hereto and incorporated by reference herein.  
11

12 **6. THE SPECIFIC ACTION THE PETITIONERS REQUEST:**

13 Petitioner CTV requests reversal or rescission of the NOV and IO. In the alternative, at a  
14 minimum the NOV and IO should be based upon the true facts and modified to satisfy the requirements  
15 of the law, whether the relief is provided by the State Water Board or the Regional Board.  
16

17 **7. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES**  
18 **RAISED IN PETITION:**

19 See CTV's Memorandum of Points and Authorities below and incorporated by reference as if  
20 restated here in full.

21 CTV has combined the statement of reasons for the petition with the points and authorities in  
22 support of the legal issues raised in the petition for the sake of administrative economy and coherence.  
23  
24  
25  
26  
27  
28

1 **8. A COPY TO THE REGIONAL BOARD:**

2 A copy of this Petition and Memorandum of Points and Authorities with attached Exhibits and  
3 Declaration is being sent concurrently to the California Regional Water Quality Control Board, San  
4 Diego Region.

5 **9. EXPLANATION OF WHY THE PETITIONER WAS UNABLE TO RAISE THESE**  
6 **SUBSTANTIVE ISSUES OR OBJECTIONS BEFORE THE REGIONAL BOARD**

7 The Regional Board issued the NOV and IO on June 1, 2007 without notice or an opportunity to  
8 be heard. Therefore, CTV was not required and was unable to raise the substantive issues or objections  
9 before the 30-day deadline to petition the State Water Resources Control Board pursuant to Water Code  
10 section 13320, subdivision (a).

11 **10. REQUEST FOR PREPARATION OF THE RECORD:**

12 The Executive Officer of the Regional Board issued the NOV and IO without notice to Petitioner  
13 CTV, and without conducting a hearing or soliciting testimony for the record.

14 By copy of this Petition CTV hereby requests from the Regional Board copies of all documents it  
15 referenced in its Notice of Violation No. R9-2007-0090 and Investigative Order No. R9-2007-0092, as  
16 well as all documents referenced in the June 1, 2007 Letter from John H. Robertus to Caltrans and South  
17 Bay Expressway re: Violation of Clean Water Act § 401 Water Quality Certification No. 99C-133 For  
18 The South Bay Expressway (SR 125 South).

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8

## 1. INTRODUCTION AND PRELIMINARY STATEMENT

Pursuant to Water Code section 13320 and California Code of Regulations, title 23, section 2050 et seq., California Transportation Ventures, Inc., General Partner of South Bay Expressway, L.P. (collectively referred to as “CTV”, herein) appeals the June 1, 2007 Notice of Violation (“NOV”) and associated Investigative Order issued by the San Diego Regional Water Quality Control Board (“Regional Board”) based on the Regional Board’s misplaced allegations that CTV is required to conduct regional air quality modeling and monitoring under the federal Clean Water Act section 401 Certification program.<sup>3</sup>

As demonstrated below, Caltrans has complied with the 401 Certification, so the NOV and Investigative Order lack any factual foundation. Additionally, the Regional Board lacks any legal authority to issue the Investigative Order.

The NOV and Investigative Order incorrectly allege that the California Department of Transportation (“Caltrans”) failed to comply with a special condition of the Clean Water Act section 401 Water Quality Certification No. 99C-133 for discharge of dredge and/or fill materials for the State Route 125 South Toll Road Project, dated April 23, 2002 (the “401 Certification,” attached hereto as Exhibit A and incorporated by reference herein). The 401 Certification was issued to Caltrans and CTV. The special condition at issue reads, in full:

**Caltrans shall *promote and pursue* a regional aerial deposition study that will include the Sweetwater Reservoir Airshed.**

(hereinafter the “special condition,” Exh. A, 401 Certification at p. 2, emphasis added.)

<sup>3</sup> A copy of Notice of Violation No. R9-2007-0090 (“NOV”), Investigative Order No. R9-2007-0092, and a Letter from John H. Robertus to Caltrans and South Bay Expressway re: Violation of Clean Water Act § 401 Water Quality Certification No. 99C-133 For The South Bay Expressway (SR-125 South) (the “Violation Letter”), all dated June 1, 2007, issued by the Regional Board are attached hereto as Exhibits B, C and D, respectively, and incorporated by reference herein. The Regional Board took this action *without notice* or hearing.

1           The NOV threatens fines and other possible liability for both Caltrans *and* CTV for *Caltrans'*  
2 alleged failures to comply with the special condition (Exh. B., NOV at p. 1). By its own terms, the  
3 special condition at issue only imposes the obligation to promote and pursue a regional study on  
4 Caltrans. Thus, CTV should not be subject to the NOV. The Investigative Order suffers the same lack  
5 of factual support for the same reason. (Exh. C, IO.).

6           Additionally, Caltrans *has* promoted and pursued a regional aerial deposition study, and  
7 continues to do so. Therefore, the NOV and Investigative Order lack the required factual basis. For this  
8 reason alone, the NOV and Investigative Order are inappropriate and improper, and should be revoked  
9 pursuant to Water Code section 13320, subdivision (c). However, the Regional Board alleges a  
10 violation based on its finding that Caltrans has not itself designed, funded, conducted and produced a  
11 regional aerial deposition study of its own. This finding misconstrues the plain language of the special  
12 condition, and it effectively seeks to revoke the 401 Certification and reissue it with a new, far more  
13 burdensome special condition nearly *six years* after the 60-day limitation period in which to do so  
14 expired.

15           The Regional Board also purports to be authorized by Water Code sections 13267, subdivision  
16 (b), 13383 and 13225, subdivision (c) to issue the Investigative Order to both Caltrans and CTV. The  
17 Investigative Order compels Caltrans and CTV to design a regional aerial deposition study and submit it  
18 for Regional Board Review by September 1, 2007, then fund, conduct and complete the study by 2009.

19           However, the plain language of Water Code sections 13267 and 13383 does not authorize the  
20 Regional Board to issue an Investigative Order to Caltrans or CTV requiring them to conduct a regional  
21 aerial deposition study of the direct deposition of nonpoint source air pollutants on Sweetwater  
22 Reservoir. Neither Caltrans nor CTV is a discharger of such airborne pollutants onto the reservoir or  
23 any other water body. Moreover, such emissions are not "discharges of waste" for purposes of Water  
24 Code sections 13267, subdivision (b) or 13383.

25           Section 13225 of the Water Code does not support the Regional Board's Investigative Order,  
26 either. It directs the Regional Board to "[r]equire as necessary any state or local agency to investigate  
27 and report on any technical factors involved in water quality control or to obtain and submit analyses of  
28

1 water” provided the costs and burdens of the report are reasonably related to the need for the report and  
2 the benefits to be obtained from it. (Wat. Code, § 13225, subd. (c)). First, *this section does not*  
3 *authorize the Regional Board to require a private entity such as CTV to produce such reports.*

4 Second, the Investigative Order fails to specify or quantify any of the alleged benefits, so there is no way  
5 to assess the reasonableness (or lack thereof) of the relationship between the costs and benefits of such a  
6 report. Thus, section 13225 does not authorize the Regional Board to require CTV to undertake a  
7 regional aerial deposition study.

8 Under the Regional Board’s interpretation of these statutes, each Regional Board would have the  
9 authority to require *anyone it chooses* who emits air pollutants that fall into waters within its jurisdiction  
10 to design, fund and conduct a regional aerial deposition study. This is a power that the legislature  
11 certainly did not intend in adopting these provisions of the Water Code, and it would lead to conflicting  
12 regulations across the state. It is appropriate to uniformly regulate aerial deposition on a statewide basis  
13 under nonpoint source legislation or regulation. If the Regional Board’s interpretation of these statutes  
14 is not reviewed and reversed, it would usurp the legislature’s authority to amend state law, and this  
15 Board’s authority to promulgate regulations implementing state law.

16 Neither the NOV nor the Investigative Order has any basis in fact or law, and should be found  
17 inappropriate or improper and rescinded pursuant to Water Code section 13220, subdivision(c).

## 19 **2. STATEMENT OF FACTS**

### 20 **A. Background: The SR 125/South Bay Expressway.**

21 CTV and Caltrans are nearing completion of the construction of the South Bay Expressway (“SR  
22 125”) in San Diego County. In 1959, the State of California added State Route 125 South Toll Road to  
23 the California Freeway/Expressway System. (Declaration of David Hawley (“Hawley Decl.”) at ¶ 3.) In  
24 1984, the San Diego Association of Governments (“SANDAG”) added SR 125 to the San Diego  
25 Regional Transportation Plan –the federally-approved twenty year plan for transportation improvements.  
26 (*Id.* at ¶ 4.) In 1990, Caltrans selected SR 125 as one of four demonstration projects to be financed,  
27 constructed and operated by private sector developers, pursuant to new legislation (codified at Sts. &  
28

Hy. Code, § 143). (*Id.* at ¶ 5.) In 1991, CTV entered into an agreement with Caltrans that granted CTV the exclusive right to design, build, operate and maintain SR 125. (*Id.* at ¶ 6.) In 1993, the Federal Highway Administration included SR 125 in the National Highway System. (*Id.* at ¶ 7.)

SR 125 is also an important component of the regional air quality compliance strategy. SR 125's traffic capacity, which will relieve congestion and improve air quality, and its provision for high occupancy vehicle lanes and a median reserved for potential transit uses, are incorporated into the Regional Transportation Plan, referenced above in the Hawley Decl. at ¶ 4. (*Id.* at ¶ 8.) This Plan has been found to be in conformity with Federal Clear Air Act requirements and will contribute to a reduction in air emissions. (*Id.*)

SR 125 is necessary to achieving the goals of the Regional Transportation Plan, which include reducing emissions from transportation sources and providing a balanced transportation system by providing more direct travel routes, thus reducing out of direction travel. (*Id.* at ¶ 9.) The extensive environmental review process included an evaluation of 17 conceptual alignments. The preferred alternative was selected in 1997, after public review and consideration of the alternatives. (*Id.* at ¶ 10.) After a decade-long environmental review process, all federal, State and local permits and approvals were obtained for SR 125. (*Id.* at ¶ 11.) SR 125 has been under construction for 4 years, and is scheduled to open in late summer, 2007. (*Id.* at ¶ 12.)

#### **B. The Present Controversy.**

In order to procure a "dredge and fill" permit, Caltrans and CTV first had to obtain a certification pursuant to section 401 of the federal Clean Water Act. On April 23, 2001, the Regional Board issued the Clean Water Act section 401 Water Quality Certification No. 99C-133 for the State Route 125 South Toll Road Project (the "401 Certification," attached hereto as Exhibit A). The 401 Certification was issued to Caltrans and CTV. The 401 Certification imposes the special condition at issue here that reads, in full:

**Caltrans shall *promote and pursue a regional aerial deposition study*  
that will include the Sweetwater Reservoir Airshed.**

(Exh. A, 401 Certification at p. 2, emphasis added.)

1 As early as September 2001, Caltrans reported to the Regional Board that it had been working  
2 with SANDAG to pursue a regional aerial deposition study; that SANDAG and a host of other local and  
3 state agencies had formed a working group, and the working group had initiated a meeting at California  
4 EPA with representatives from the Office of Environmental Health Hazard Assessment, the California  
5 Air Resources Board, the California Department of Health Services, and the State Water Resources  
6 Control Board. (Letter from Charles "Muggs" Stoll, Deputy District Director, Caltrans District 11 to  
7 John H. Robertus, Executive Officer, San Diego Regional Water Quality Control Board, dated  
8 September 4, 2001 at p. 2 ("September 2001 Letter" attached as Exhibit E.)

9 In the same letter, Caltrans informed the Regional Board that Sweetwater Authority had "invited  
10 [Caltrans] 'into a partnership' involving [Sweetwater Authority's] air quality monitoring program." (*Id.*  
11 at p. 1.) The Sweetwater air quality monitoring program ("the Sweetwater Study") is designed to assess  
12 the impacts of aerial deposition from vehicles traveling on SR 125 on the Sweetwater Reservoir. (*Id.*)  
13 Caltrans informed the Regional Board that it declined the offer, in part because "partnering" with  
14 Sweetwater Authority would not fulfill the special condition since the Sweetwater Study was site- and  
15 project-specific, not regional. (*Id.*) It also detailed the ways in which U.C. Davis scientific experts had  
16 found the first two reports from the Sweetwater Study to be deficient. (*Id.*)

17 Thus, instead of "partnering" in the Sweetwater Study, Caltrans reported that it would continue  
18 to pursue and promote the kind of regional study recommended by U.C. Davis experts. (*Id.* at 2.)  
19 However, Caltrans noted that after meeting at California EPA with representatives from the Office of  
20 Environmental Health Hazard Assessment, the California Air Resources Board, the California  
21 Department of Health Services, and the State Water Resources Control Board, "[t]he meeting resulted in  
22 no further action" because, in its opinion, "the consensus of the agencies involved was that further  
23 study/research on this issue was not warranted." (*Id.* at 2.) Nevertheless, Caltrans offered to be a  
24 willing participant in any multi-disciplinary team of technical specialists "as long as the approach is  
25 regionally based, and not project specific." (*Id.*)  
26  
27  
28

1 From CTV's records, it appears the consensus did change, and Caltrans continued to work with  
2 SANDAG to formulate an appropriate regional study.<sup>4</sup> Caltrans reported to the Regional Board as  
3 recently as 2005 that Caltrans and SANDAG had drafted a scope for a regional study entitled *Evaluate*  
4 *Regional On-Road Mobile Source Air Emission Impacts on Drinking Water Reservoirs* and sent a  
5 proposal to the National Cooperative Highway Research Program ("NCHRP") for approval. (August 4,  
6 2005 Response to RWQCB letter dated July 8, 2005 at p. 1 ("August 4, 2005 Response" attached as  
7 Exhibit F); *see also* Notice of Violation No. R9-2005-0070, dated February 8, 2005 at p. 1 ("NOV No.  
8 R9-2005-0070" attached as Exhibit G); March 10, 2005 Response to RWQCB Notice of Violation (No.  
9 R9-2005-0070), dated February 8, 2005 at p. 1 ("Response to NOV R9-2005-0070" attached as Exhibit  
10 H); Minutes of March 10, 2005 Notice of Violation Meeting, SR 125 South, prepared by EDAW, Inc., at  
11 p. 1 ("NOV Meeting Minutes"), attached as Exhibit I).)

12 It is important to note that throughout the correspondence cited above, and even in the June 1,  
13 2007 NOV, the Regional Board always cites the exact same language from the 401 Certification that  
14 only requires Caltrans to "promote and pursue" a "regional" study. (*See, e.g.*, Exh. G, NOV No. R9-  
15 2005-0070 at p. 1; Exh. B, NOV at p. 1.) More importantly, it does not appear from CTV's records that  
16 the Regional Board ever informed Caltrans or CTV that Caltrans' and SANDAG's proposed regional  
17 study failed to fulfill Caltrans' duty to "promote and pursue" a regional aerial deposition study. (Exh. C  
18 at pp. 3-5.)

19 Instead, after receiving a letter from Sweetwater Authority in January of 2007 complaining that  
20 *in 1999*—two years before the 401 Certification issued<sup>5</sup>—Caltrans had refused to help fund and conduct

---

22 <sup>4</sup> CTV does not have all the documents cited by the Regional Board. For instance, the Investigative  
23 Order cites a letter dated November 5, 2001—that is to say, a letter written over six months *after* the 401  
24 Certification was issued—to Caltrans District 11. According to the IO, in that letter the Regional Board  
25 purported to "describe its expectation" that Caltrans would take "an active, rather than a passive, role in  
26 the design and implementation of a study that would include actual measurements of the deposition of  
27 air pollutants in a region that includes the Sweetwater Reservoir Airshed." (Exh. C, IO at p. 2 (internal  
28 quotation marks omitted).) This letter appears to be a response to the September 2001 Letter from  
Caltrans. Again, the NOV and Investigative Order were issued without notice or a hearing. By copy of  
this Petition and Memorandum of Points and Authorities, CTV has requested copies of all documents  
referred to in the NOV, the Investigative Order and the Violation Letter. (*See* Petition, *supra*, ¶ 10.)

<sup>5</sup> Letter from Dennis Bostad, General Manager, Sweetwater Authority to John H. Robertus, Executive

1 the Sweetwater Study, the Regional Board issued the present Investigative Order and NOV. For the first  
2 time in 6 years, the Investigative Order requires Caltrans to either design, fund, conduct and produce a  
3 regional aerial deposition study of its own, or “partner” with Sweetwater Authority and U.S.G.S. in the  
4 Sweetwater Study that it declined to join in 1999.

5 The Investigative Order imposes for the first time the following new conditions not set forth in  
6 the 401 Certification, among others:

- 7 • Caltrans shall ***conduct an aerial deposition study assessing, at a minimum, the effects of***  
8 ***construction of SR 125 on the Sweetwater River and Reservoir;***
- 9 • Caltrans shall submit the study design to the Regional Board no later than ***September 1,***  
10 ***2007;***
- 11 • Caltrans shall propose monitoring stations that would be used to assess whether or not  
12 pollutants from the SR 125 are transported to the Sweetwater River and Reservoir;
- 13 • Caltrans “may” propose water and/or sediment sampling to supplement aerial deposition  
14 samples;
- 15 • Caltrans shall prepare and submit ***quarterly monitoring reports beginning on December***  
16 ***10, 2007*** containing raw and summary data as well as an assessment of the fate and  
17 transport of a representative suite of airborne pollutants associated with vehicle exhaust;
- 18 • Caltrans shall prepare and submit ***quarterly technical reports;***
- 19 • Caltrans shall submit a ***final report by June 30, 2009.***

20 (Exh. C, IO at pp. 3-5.)

21 The Regional Board offers that “Caltrans may meet the special condition in Resolution No.  
22 2001-51 [issuing the 401 Certification] and the requirements of this order ***if they partner with the***  
23 ***Sweetwater Authority and the United States Geological Survey in the aerial deposition study that is***  
24

25  
26 Officer, San Diego Regional Water Quality Control Board re: State Route 125 – 401 Water Quality  
27 Certification SWA File: Route 125 – General, dated January 9, 2007 (“Sweetwater Complaint Letter”  
28 attached as Exhibit J.) Notably, the letter was not sent or copied to anyone other than the Regional  
Board, other Sweetwater personnel, and a private attorney. (*Id.* at pp. 1, 4.)

1 *underway.*” (Exh. C, IO at p. 5, emphasis added; footnote omitted.) As the Regional Board explains in  
2 a footnote to this “alternative,” the Sweetwater study focuses *exclusively* on the Sweetwater *watershed*,  
3 not the entire San Diego region. (*Id.* at p. 5, fn. 5 (citing the Phase I study by Mendes, Gregory O., *et*  
4 *al.*, Water-and Air-Quality Monitoring of the Sweetwater Reservoir Watershed, San Diego County,  
5 California—Phase One Results, Continued, 1999-2001).) It is important to note that the Regional Board  
6 has known since at least September 1, 2004 that Caltrans refused to “partner” with Sweetwater in its  
7 site- and project-specific study in part because to do so would not fulfill the special condition. (Exh. E,  
8 September 2001 letter at p. 1.)

9 Finding 7 in the Investigative Order states that the Regional Board’s review of its file for the 401  
10 Certification “revealed no evidence that a regional aerial deposition study consisting of actual  
11 measurements has been initiated by Caltrans *and* CTV. Nor is it evident that Caltrans *and* CTV have  
12 participated in any ongoing regional aerial deposition study that includes the Sweetwater Reservoir  
13 Airshed.” (Exh. H, IO at 2 [Finding 7], emphasis added.)

14 Although the terms of the original 401 Certification and the present Investigative Order apply  
15 only to Caltrans, the text of Finding 7 and the very fact that the NOV and Investigative Order were  
16 issued to Caltrans *and* CTV suggest that the Regional Board expects CTV to fund a study or “partner”  
17 with Sweetwater Authority as well. CTV therefore believes that although the order only expressly  
18 requires Caltrans to either conduct a study or “partner” with Sweetwater in its ongoing study, the  
19 Regional Board believes that CTV must do so as well.

### 20 **3. ARGUMENT AND LEGAL ANALYSIS**

#### 21 **A. The Notice of Violation Is Unsupported by the Facts.**

22 Caltrans *has* promoted and pursued a region-wide aerial deposition study. Indeed, the Regional  
23 Board does not appear to have objected to its joint efforts with SANDAG to seek federal funding for  
24 their proposed study titled *Evaluate Regional On-Road Mobile Source Air Emission Impacts on*  
25 *Drinking Water Reservoirs*. (Exh. F, August 4, 2005 Response at p. 1.) As detailed in the statement of  
26 facts above, Caltrans has invested a great deal of expertise and work organizing and attending multi-  
27  
28

1 disciplinary meetings, recruiting agency participation, and developing a regional study seeking federal  
2 funding.

3 The American Heritage Dictionary defines “promote” as follows:

- 4 1. a. To raise to a more important or responsible job or rank.
- 5 b. To advance (a student) to the next higher grade.
- 6 2. To contribute to the progress or growth of; further. See Synonyms at
- 7 advance.
- 8 3. To urge the adoption of; advocate: *promote a constitutional*
- 9 *amendment.*
- 10 4. To attempt to sell or popularize by advertising or publicity:
- 11 *commercials promoting a new product.*
- 12 5. To help establish or organize (a new enterprise), as by securing
- 13 financial backing: *promote a Broadway show.*

14 (American Heritage Dict. (4th ed. 2004) *available at* <http://dictionary.reference.com/browse/promote>,  
15 italics original.)

16 Caltrans’ efforts to help “establish or organize” a multi-disciplinary team and “secure financial  
17 backing” for the *Evaluate Regional On-Road Mobile Source Air Emission Impacts on Drinking Water*  
18 *Reservoirs* study fulfills the most relevant of the definitions, 3 and 5, above.

19 “Pursue” is defined, in relevant part, as follows:

- 20 2. To strive to gain or accomplish: *pursue lofty political goals.*
- 21 3. To proceed along the course of; follow: *a ship that pursued the*
- 22 *southern course.*
- 23 4. To carry further; advance: *Let's not pursue this argument.*

24 (American Heritage Dict. (4th ed. 2004) *available at* <http://dictionary.reference.com/browse/pursue>,  
25 italics original.)

26 Notably, under each definition of “pursue” there is no requirement that one design, fund, conduct  
27 or *complete* the objective pursued.

1           Moreover, the special condition originally imposed has no established milestones, no time line,  
2 and no end date. Issuance of the NOV implies that Caltrans and CTV have already missed a deadline  
3 for completion of a regional study with actual measurements. But the 401 Certification does not impose  
4 such a deadline. Why? Because to do so would be incompatible with the concepts of “promote” and  
5 “pursue.”

6           The lack of a deadline in the 401 Certification generates another fatal flaw in the NOV. Because  
7 there are no dates for compliance specified in the special condition, the NOV does not—because it  
8 cannot—state *when* Caltrans (or CTV) began violating the requirement that Caltrans “promote and  
9 pursue” a regional aerial deposition study. (Exh. B, NOV at p. 2 [Summary of Violation].) The NOV  
10 threatens fines of between \$100 to \$5000 for each day the violation occurs. (Exh. B, NOV at p. 1.)  
11 However, the notice fails to give Caltrans or CTV any notice of how much, if any, potential liability  
12 they face if the Regional Board seeks civil penalties pursuant to Water Code section 13350.

13           **B.     The Notice of Violation Works an Unlawful Revocation and Reissuance of the**  
14           **Special Condition in Violation of Law and CTV’s Right to Notice And a Hearing.**

15           The NOV also alleges a violation of a requirement not found in the 401 Certification, but rather  
16 found in a letter that the Regional Board sent to Caltrans over 6 months *after* the Regional Board had  
17 adopted the Resolution issuing 401 Certification. (Exh. B, NOV at p. 2 [Finding 2].) The special  
18 condition only requires Caltrans to “promote and pursue” a regional aerial deposition study. (Exh. A,  
19 401 Certification at p. 2.) In contrast, the letter the Regional Board cites in Finding 2 of its NOV states  
20 the Regional Board’s “expectation” that Caltrans would take “an active, rather than a passive, role in the  
21 design and implementation of a study that would include actual measurements of the deposition of air  
22 pollutants in a region that includes the Sweetwater Reservoir Airshed.” (Exh. B, NOV at p. 2 [Finding  
23 2] (internal quotation marks omitted) (citing to a “a letter dated November 5, 2001 to Mr. Charles Stoll,  
24 Deputy District Director for Caltrans District 11”).)

25           Compare the 401 Certification’s special condition to the November 2001 letter’s “expectation,”  
26 then compare each to the “Summary of Violation” in the NOV, which reads, in relevant part:

1 The Regional Board review of the 401 Certification and supporting  
2 documents . . . revealed no evidence that *a regional air deposition study*  
3 *consisting of actual measurements of the deposition of air pollutants*  
4 *had been initiated by Caltrans and CTV, nor that Caltrans and CTV*  
5 *have participated on [sic] any ongoing regional air deposition study that*  
6 *includes the Sweetwater Reservoir Airshed.*

7 (Exh. B, NOV at p. 2, emphasis added.) Despite the plain language of the 401 Certification, for the first  
8 time on June 1, 2007 the Regional Board is retroactively requiring Caltrans to “initiate” a regional air  
9 study “consisting of actual measurements of the deposition of air pollutants . . .” (*Id.*)

10 Further, although the 401 Certification was issued to Caltrans and CTV, the special condition is  
11 unique insofar as it is the only condition in the 401 Certification that applies on its face to Caltrans  
12 alone, not “Caltrans and CTV.” (Exh. A, 401 Certification; compare the special condition at p. 2 with  
13 all remaining conditions; except for condition A.2, “Caltrans and CTV” are jointly named as responsible  
14 for meeting every other individual condition in the 401 Certification.) The Regional Board’s “Finding”  
15 2 attempts to retroactively impose the special condition that related to Caltrans alone on CTV. **Thus,**  
16 ***there is no finding at all to support the Regional Board’s NOV with respect to CTV.***

17 The November 5, 2001 letter to Caltrans that Finding 2 is based upon has no legal effect on the  
18 401 Certification. The Regional Board cannot revoke and reissue a special condition in a 401  
19 Certification after 60 days. (33 U.S.C. § 1341(a)(3), allowing 60 days for the state to give notice of  
20 specific changed conditions that may result in specified violations of the CWA.) If given effect, the  
21 November 5, 2001 letter would work an unlawful *six year extension* of the limitation period.

22 The Investigative Order that the Regional Board issued the same day as the NOV also attempts  
23 (but fails, for reasons explained below) to add a requirement that Caltrans design and implement a study  
24 that would include actual measurements of aerial deposition of pollutants in an area including the  
25 Sweetwater Reservoir Airshed. (Exh. C, IO at pp. 3-5.) Thus, the Regional Board has effectively  
26 notified Caltrans and CTV that as of June 1, 2007 they themselves must implement a regional study, and  
27 that they simultaneously failed to comply.

1 Caltrans has not violated the special condition in the 401 Certification. The NOV is not based on  
2 a violation of the plain language in the 401 Certification, it is not based on any evidence in the record,  
3 and to the extent it attempts to revoke and reissue the special condition, it violates federal law and  
4 CTV's right to notice and a hearing.

5 As a result, the Regional Board's action was neither appropriate nor proper. Thus, the State  
6 Water Resources Control Board should rescind the NOV and Investigative Order, or remand to the  
7 Regional Board to do the same pursuant to its authority under Water Code section 13320, subdivision  
8 (c).

9 **C. The Investigative Order Is Unsupported by the Facts and Unlawfully Attempts to**  
10 **Impose Further Special Conditions on Caltrans and CTV.**

11 A careful analysis of the Investigative Order's alleged basis in fact and law un.masks what  
12 appears to be the Regional Board's ulterior motive, that is, to force Caltrans and CTV to fund a site- and  
13 project-specific study of the impacts of vehicle emissions from SR 125 on the Sweetwater Reservoir.  
14 As shown below, each attempt to rationalize its Investigative Order fails. To require Caltrans or CTV to  
15 design, fund, implement and complete a regional study, or else "partner" in the Sweetwater Study was  
16 never a condition of the 401 Certification. To impose them now in the form of an Investigative Order  
17 would work an unlawful alteration of the 401 Certification long after the time to do so has passed. Thus,  
18 the Investigative Order should be rescinded as inappropriate and improper.

19 **1. Because Caltrans Has Not Violated Its Obligation to Promote and Pursue a**  
20 **Regional Aerial Deposition Study, the Investigative Order Has No Factual**  
21 **Basis.**

22 Like the NOV, the Investigative Order is also based on the alleged failure to comply with the  
23 special condition. (Exh. C, IO at p. 2 [Finding 7]; *see also id.* at p. 5 [Alternative Form of  
24 Compliance].) As demonstrated above, Caltrans *has* complied with the plain language of the special  
25 condition, and the Regional Board cannot belatedly shift its position and impose new specifications for  
26 compliance over six years later.

1                   **2.       To Opt for the Alternative Form of Compliance in the Investigative Order**  
2                   **Would Violate the Special Condition and Subject Caltrans and CTV to**  
3                   **Penalties Under the NOV.**

4           Opting for the Alternative Form of Compliance offered in the Investigative Order put Caltrans  
5 and CTV in an impossible position with respect to the NOV. To comply with the former would violate  
6 the latter. The 401 Certification requires Caltrans to promote and pursue a *regional* aerial deposition  
7 study. As explained above, the Alternative Form of Compliance would require Caltrans and CTV to  
8 “partner” in a site-specific study of the air quality in the Sweetwater *watershed* that is tied to the impacts  
9 of SR 125 on the Sweetwater Reservoir.

10           It would be inappropriate and improper to allow the Regional Board to put Caltrans and CTV  
11 into such a regulatory Catch-22, especially when Caltrans expressed concern about a site-specific study,  
12 and in response, the Regional Board itself rejected just such an Alternative Form of Compliance six  
13 years ago when it required Caltrans to promote and pursue a *regional* study.

14                   **3.       The Regional Study Required by The Investigative Order Attempts to**  
15                   **Unlawfully Amend the 401 Certification.**

16           The 401 Certification requires Caltrans to “*promote and pursue*” a region-wide study, not  
17 conduct, fund and produce a study that specifically assesses “the effects of construction of SR 125 on  
18 the Sweetwater River and Reservoir.” (Exh. C, IO at p. 3.) As noted above in relation to the NOV, the  
19 requirement to “promote and pursue” has no timeline with milestones, no end date, and no definition of  
20 “promote and pursue.”

21           Nevertheless, the Regional Board attempts to retroactively impose *additional* special conditions  
22 on Caltrans for Caltrans’ alleged failure to comply with the special condition, and it threatens CTV with  
23 penalties if Caltrans fails to comply with these additional conditions.<sup>6</sup> In addition to “pursuing and  
24

25 \_\_\_\_\_  
26 <sup>6</sup> As noted above in the Statement of Facts, Finding 7 in the Investigative Order states that neither  
27 Caltrans nor CTV has participated in any ongoing study or conducted a study with actual measurements.  
28 (Exh. C, IO at 2 [Finding 7].) Thus, it appears that the Regional Board now “expects” CTV to fund a  
study or “partner” with Sweetwater and U.S.G.S. These are not violations of the special condition.

1 promoting” a region-wide aerial deposition study, the Investigative Order imposes for the first time the  
2 following additional conditions, among others:

- 3 • Caltrans shall *conduct an aerial deposition study assessing, at a minimum, the effects of*  
4 *construction of SR 125 on the Sweetwater River and Reservoir;*
- 5 • Caltrans shall submit the study design to the Regional Board no later than *September 1,*  
6 *2007;*
- 7 • Caltrans shall propose monitoring stations that would be used to assess whether or not  
8 pollutants from the SR 125 are transported to the Sweetwater River and Reservoir;
- 9 • Caltrans “may” propose water and/or sediment sampling to supplement aerial deposition  
10 samples;
- 11 • Caltrans shall prepare and submit *quarterly monitoring reports* containing raw and  
12 summary data as well as an assessment of the fate and transport of a representative suite  
13 of airborne pollutants associated with vehicle exhaust;
- 14 • Caltrans shall prepare and submit *quarterly technical reports;*
- 15 • Caltrans shall submit a *final report by June 30, 2009.*

16 (Exh. C, IO at pp. 3-5.)<sup>7</sup>

17 The Regional Board’s Investigative Order is an amendment to the 401 Certification in disguise.  
18 It imposes a radically different special condition on Caltrans *and* (for the first time) CTV.

19  
20  
21  
22  
23  
24 <sup>7</sup> Again, the Investigative Order also cites a letter dated November 5, 2001—that is to say, a letter  
25 written over six months *after* the 401 Certification was issued—to Caltrans District 11 where the  
26 Regional Board purports to “describe its expectation” that Caltrans would take “an active, rather than a  
27 passive, role in the design and implementation of a study that would include actual measurements of the  
28 deposition of air pollutants in a region that includes the Sweetwater Reservoir Airshed.” (Exh. C, IO at  
p. 2 (internal quotation marks omitted).) As explained above, this letter has no legal effect as it cannot  
have altered the special condition after the fact.

1                   **4.       The Regional Board Cannot Seek to Retroactively Amend the 401**  
2                   **Certification to Impose Additional Requirements by Way of the So-Called**  
3                   **Alternative Form of Compliance in the Investigative Order.**

4           Tellingly, the Regional Board offers that “Caltrans may meet the special condition in Resolution  
5 No. 2001-51 [issuing the 401 Certification] and the requirements of this order *if they partner with the*  
6 *Sweetwater Authority and the United States Geological Survey in the aerial deposition study that is*  
7 *underway.*” (Exh. C, IO at p. 5, emphasis added; footnote omitted.) As the Regional Board explains in  
8 a footnote to this “alternative,” the Sweetwater study focuses exclusively on the Sweetwater *watershed*,  
9 not the entire San Diego region. (*Id.* at p. 5 n.5 (citing the Phase I study by Mendes, Gregory O., *et al.*,  
10 Water-and Air-Quality Monitoring of the Sweetwater Reservoir Watershed, San Diego County,  
11 California—Phase One Results, Continued, 1999-2001).)

12           The Regional Board imposed the terms of the 401 Certification and the special condition at issue.  
13 It did not impose then what it requires now.

14           The Sweetwater Study began in 1998, *three years* before the Regional Board negotiated and  
15 issued the 401 Certification. (Exh. C, IO at p. 5, n.5; Exh. D, Violation Letter at p. 2 (“In 1998, the  
16 Sweetwater Authority, in conjunction with the [U.S.G.S.], initiated an air deposition study.” (footnote  
17 omitted).) The Violation Letter describes “one of the goals” of the Sweetwater Study as “compar[ing]  
18 chemical concentrations of samples from air, water and bed sediment, and determine if any changes in  
19 reservoir water quality were the result of atmospheric deposition of organic chemicals and metals  
20 originating from the construction and operation of SR 125.” (Exh. D, Violation Letter at p. 2.)

21           If the Regional Board wanted Caltrans (and CTV) to “partner” with Sweetwater and U.S.G.S. in  
22 2001, it could have, and should have simply said so in the terms of the special condition. It did not  
23 because Caltrans expressed its concerns with any study tied to a specific project. The Regional Board  
24 must know this because it cites testimony from the Regional Board Meeting where the Resolution was  
25 adopted from Mr. Gary Gallegos, then Caltrans District 11 Director, who stated:

26                   We [at Caltrans District 11] are committed to being a part of a regional  
27                   study that would look [at] what the impacts of airborne pollutants would  
28

1 have on drinking water. And we think it would be a broad regional study  
2 that may be looked, [sic] the whole San Diego region, and we would  
3 commit to being a part of that.

4 (Exh. C, IO at p. 2.) The Regional Board agreed with this regional approach as reflected in the language  
5 of the special condition as adopted.

6 Even *after* the 401 Certification was issued, Caltrans would not agree to anything more than  
7 promoting and pursuing a regional study. (Exh. E, September 2001 Letter at p. 1.) That is all the  
8 Regional Board's own language in the 401 Certification required it to do. And Caltrans complied.

9 **5. Caltrans and CTV Cannot Opt for the Alternative Form of Compliance**  
10 **Because It Does Not Define "Partnership" With Sweetwater Authority and**  
11 **U.S.G.S.**

12 The Alternative Form of Compliance is hopelessly vague and unenforceable. What does  
13 "partnership" with Sweetwater Authority and U.S.G.S. mean? CTV can only imagine that by "partner"  
14 the Regional Board means "fund." But even on that interpretation, what would Caltrans and CTV have  
15 to pay to satisfy the Regional Board that they are "partnering" with the other agencies? Would 1/3 of  
16 the cost of the study suffice? If so, which portion of the study, which began in 1998 and will last until 3  
17 years after completion of SR 125 would they be funding? Would Caltrans and CTV pay costs going  
18 forward, or would that trigger another NOV and Investigative Order for failure to pay 1/3 of the costs of  
19 the study to date? The Alternative Form of Compliance does not say.

20 **6. The Investigative Order and NOV Appear to be Pretextual, and Should be**  
21 **Revoked to Avoid the Appearance of Bias.**

22 The "Alternative Form of Compliance" in the Investigative Order could be the Regional Board's  
23 attempt to mediate a dispute between Sweetwater Authority and Caltrans by forcing Caltrans to help  
24 fund Sweetwater's study. After all, the Investigative Order requires CTV to design a regional aerial  
25 deposition study by September 1, 2007, and begin reporting measurements and analysis by December  
26 10, 2007! (Exh. C, IO at pp. 3-5.) This hardly leaves CTV any "alternative" but to "partner" with  
27 Sweetwater Authority. Or perhaps the Regional Board is acting on second thoughts it "expressed" as an  
28

1 “expectation” in November of 2001, and wishes to impose by way of an Investigative Order what it  
2 failed to require in the 401 Certification. Acting on any such motive, no matter how well-intentioned,  
3 would constitute an abuse of discretion.

4       These suspicions are founded on what the Regional Board says and does not say in issuing the  
5 NOV and Investigative Order. For instance, the Violation Letter cites as a basis for its NOV a fact for  
6 which it conspicuously did **not** include any evidence in the NOV, namely, that “[t]he Sweetwater  
7 Authority has made repeated attempts [sic] and requests to Caltrans requesting assistance with [the  
8 Sweetwater Study].” (Exh. D, Violation Letter at 2 (footnote omitted).) The footnote to this last basis  
9 for the NOV cites “Letter dated January 9, 2007 to John Robertus, Regional Board Executive Officer,  
10 from Dennis Bostad, General Manager, Sweetwater Authority” (not included as an attachment to the  
11 Violation Letter). (*Id.*) One shocking fact about the Sweetwater Complaint Letter that the Regional  
12 Board chose not to include in its Findings: the “repeated attempts and requests” Sweetwater Authority  
13 was complaining about all “***occurred well before the issuance of the 99C-133 certification.***” (Exh. J,  
14 Sweetwater Complaint Letter at p. 2.)

15       What difference could it make to Caltrans’ alleged failure to comply with the special condition to  
16 promote and pursue a ***regional*** aerial deposition study if it refused ***before the 401 Certification issued to***  
17 “partner” with Sweetwater Authority in a site-specific study designed to sample air in the Sweetwater  
18 Reservoir ***watershed?*** None. Why, then, include it as a basis for an NOV and offer it up as an  
19 “Alternative Form of Compliance” in the accompanying Investigative Order?

20       CTV can only speculate without having been given the opportunity for a hearing at the Regional  
21 Board. However, the Violation Letter, NOV and Investigative Order certainly support the hypothesis  
22 that the NOV and Investigative Order are pretextual attempts to force Caltrans (and now CTV as well)  
23 to fund the Sweetwater Study.

24       If the Regional Board issued the NOV and Investigative Order at the prompting of Sweetwater  
25 Authority, that raises the specter of bias in favor of Sweetwater Authority, and the Regional Board’s  
26 action should be reversed if for no other reason than to avoid the appearance of bias.

1           **D.     None of the Sections of the California Water Code Cited in Support of the**  
2                   **Investigative Order Authorizes the Regional Board to Require Caltrans or CTV to**  
3                   **Design, Fund, and Implement a Regional Aerial Deposition Study.**

4           Aside from the utter lack of factual foundation for the NOV and Investigative Order, the  
5           Regional Board lacks the legal authority to issue the Investigative Order pursuant to (Wat. Code,  
6           §§ 13267, subd. (b), 13383, subd. (a) and 13225, subd. (c)), as it purports to do. (Exh. C, IO at p. 1  
7           [Findings 1, 2].) By way of its Investigative Order, the Regional Board proposes a radical new  
8           interpretation of “discharger,” “investigate the quality of any waters of the state within its region” and  
9           “discharge of waste” under the Water Code. As demonstrated below, the Regional Board’s  
10          interpretation would empower it to require any person, agency or business that emits air pollutants that  
11          could be deposited directly into any water within its jurisdiction to conduct region-wide aerial deposition  
12          studies. Neither the plain language of these sections nor any manifest intent of the legislature  
13          contemplates such sweeping new authority for Regional Water Quality Control Boards.

14                   **1.     Section 13267, subd. (b) Does Not Authorize the Regional Board to Issue the**  
15                   **Investigative Order.**

16                           **a)     Neither Caltrans nor CTV is a Discharger of Aerial Pollutants Into**  
17                           **Sweetwater Reservoir, thus, Section 13267, subd. (b) of the Water**  
18                           **Code Does Not Authorize the Regional Board to Issue the**  
19                           **Investigative Order.**

20          It is beyond Caltrans’ and CTV’s jurisdiction or ability to control or regulate vehicle emissions.  
21          Yet it is vehicle emissions that the Regional Board admits are the ultimate sources of direct aerial  
22          deposition. (Exh. C, IO at p. 2 [Finding 8].) Therefore Caltrans and CTV cannot be identified as the  
23          (potential) dischargers of such waste in order to trigger the Regional Board’s authority under Water  
24          Code section 13267, subdivision (b). Yet that is precisely the meaning of Finding 9, which states “SR  
25          125 runs in close proximity to the Sweetwater Reservoir and the Sweetwater River; aerially-born metals  
26          and other pollutants *from this roadway* may be deposited *from SR 125 onto the surfaces of the*  
27          *Sweetwater River and Reservoir.*”  
28

1 The finding grossly mischaracterizes the source of the “aerially-born metals and other  
2 pollutants.” Once operational, neither CTV, *nor Caltrans, nor the road will emit metals and other*  
3 *pollutants to the air: the tailpipes, tires and brakes of the vehicles will.*

4 Without a predicate “discharge” from CTV, Caltrans or the road itself, Water Code  
5 section 13267, subdivision (b) cannot support issuance of an Investigative Order.

6 **b) Interpreting “Discharge of Waste” in Section 13267, subdivision (b) to**  
7 **Include Direct Aerial Deposition of Air Pollutants Allows for**  
8 **Arbitrary and Inconsistent Regional Regulation.**

9 The Regional Board’s Investigative Order assumes that “discharge of waste” includes airborne  
10 particles from any stationary or mobile source of airborne pollutants that might find their way into the  
11 waters of its region. (Exh. C, IO at pp. 2-3 [Finding 8].) This interpretation of Water Code  
12 section 13267 could literally justify each Regional Board issuing an Investigative Order to anyone who  
13 drives a vehicle or operates a marine vessel anywhere in or upwind of the regional board’s jurisdiction.<sup>8</sup>  
14 The individual motorists who use SR 125 *and every other roadway in San Diego County* (not to  
15 mention marine vessels that emit diesel and oil particulates) would be “discharging waste” into the  
16 Sweetwater Reservoir.<sup>9</sup>

17 EPA guidance on “air deposition” distinguishes between “direct” and “indirect” loading to water  
18 bodies from aerial deposition. (US EPA, *Frequently Asked Questions About Atmospheric Deposition: A*  
19 *Handbook For Watershed Managers*, EPA-453/R-01-009 (September 2001), at p. 6, *available at*  
20 *www.epa.gov/oar/oaqps/gr8water/handbook/*.) The State Water Resources Control Board has  
21 acknowledge the same. (State Water Resources Control Board, Regional Water Quality Control Boards  
22

---

23 <sup>8</sup> As explained above, even under this extraordinarily broad interpretation of “discharge of waste,” it is  
24 still not the case that CTV is or will be “discharging waste” into the Sweetwater Reservoir via aerial  
25 deposition.

26 <sup>9</sup> This appears to be why Caltrans refused to agree to a special condition in the 401 Certification that  
27 would tie any aerial deposition study it was to “promote and pursue” to a limited region in the  
28 immediate vicinity of the Sweetwater Reservoir, insisting instead on a “broad regional study” that would  
look at “the whole San Diego region.” (Exh. C, IO at pp. 1-2 (quoting Gary Gallegos, then Caltrans  
District 11 Director).)

1 and California Coastal Commission, *Annual Progress Report for Federal Clean Water Act Section 319*  
2 *Program, July 2005 through June 2006*, April 2007 at page 3, “Atmospheric deposition and  
3 hydromodification are also sources of non point source pollution.”)

4 The Regional Board is attempting to regulate providers of infrastructure by way of  
5 contamination from nonpoint sources of direct aerial deposition to water bodies (i.e., vehicles in this  
6 instance) using statutory language that was not designed to cover this pathway to contamination. This  
7 would lead to divergent regulatory requirements for each regional board. Instead, it would be  
8 appropriate for the legislature or the SWRCB to set statewide policy treating aerial deposition as a  
9 nonpoint source.

10 Such an interpretation of the Water Code is implausible on its face. There is no “discharge of, or  
11 proposal to discharge waste” within the plain meaning of Water Code sections 13267, subdivision (b) or  
12 13383, subdivision (a) to justify issuing an Investigative Order to Caltrans and CTV. Thus, the Regional  
13 Board has no authority to issue an Investigative Order to compel Caltrans and CTV to undertake an  
14 aerial deposition study (or participate in Sweetwater’s) based on the plain meaning of section 13267.

15 Direct aerial deposition of vehicle emissions is unquestionably a significant issue that needs to be  
16 addressed. If the State Water Resources Control Board believes that anyone who discharges or proposes  
17 to discharge waste via aerial deposition should be required to undertake studies of the impacts to every  
18 body of water within its jurisdiction, it would, at a minimum, have to undertake formal rulemaking  
19 proposing that interpretation, opening it up to public comment and ultimately adopting the regulation.  
20 However, as shown below, it would take an act of the Legislature to amend the Water Code.

21 **c) The Plain Language of Section 13267, subdivision (b) Does Not**  
22 **Authorize the Regional Board to Require Air Quality Studies.**

23 The only time a Regional Board may issue an Investigative Order under the authority of Water  
24 Code, § 13267 is to “investigate the quality of any waters of the state within its region.” (Wat. Code,  
25 § 13267, subd. (a), emphasis added.) It further specifies, in part, that

26 [i]n conducting an investigation specified in subdivision (a), the regional  
27 board may require that any person who has discharged, discharges, or is  
28

1 suspected of having discharged or discharging, or who proposes to  
2 *discharge waste* within its region, or any citizen or domiciliary, or  
3 political agency or entity of this state who has discharged, discharges, or is  
4 suspected of having discharged or discharging, or who proposes to  
5 *discharge, waste* outside of its region that could affect the quality of  
6 waters within its region shall furnish, under penalty of perjury, technical  
7 or monitoring program reports which the regional board requires.

8 (Wat. Code, § 13267, subd. (b)(1), emphasis added.)

9 According to the Regional Board's Investigative Order, Caltrans and CTV *must* monitor,  
10 measure, analyze, summarize and report aerial deposition *around* Sweetwater Reservoir, but merely  
11 may supplement such study of aerial deposition on land with water and sediment samples (presumably  
12 from Sweetwater Reservoir).<sup>10</sup> (Exh. C, IO at pp. 3-5.) The plain language of section 13267 limits the  
13 Regional Board's authority to ordering investigations of *water quality*, not air quality.

14 **d) The Regional Board Has Not Shown That the Burdens and Costs of**  
15 **the Proposed Caltrans/CTV Study Bear a Reasonable Relationship to**  
16 **the Benefits as Required by Section 13267, subdivision (b).**

17 The Investigative Order cannot be based on section 13267, subdivision (b) for another,  
18 independent reason: The Regional Board has not met its burden of showing under those sections that  
19 the cost of the regional study bears a "reasonable relationship" to the expected benefits. Section 13267  
20 reads, in relevant part:

21 The burden, including costs, of these reports shall bear a reasonable  
22 relationship to the need for the report and the benefits to be obtained from  
23 the reports. In requiring those reports, the regional board shall provide the  
24 person with a written explanation with regard to the need for the reports,  
25  
26

---

27 <sup>10</sup> A point which raises serious questions about the adequacy of the Investigative Order with respect to  
28 specificity. CTV reserves the right to raise this issue at the hearing on this petition.

1 and shall identify the evidence that supports requiring that person to  
2 provide the reports.

3 (Wat. Code, § 13267, subd. (b)(1).)

4 Finding 11 of the Investigative Order purports to provide the written explanation that  
5 demonstrates that the burden, including costs, of designing, initiating and funding the aerial deposition  
6 reports bears a “reasonable relationship” to the need for the report and the benefits to be obtained from  
7 it.

8 Instead of an explanation, the Regional Board speculates that

9 [p]ollutant loading from [aerial deposition of particulates emanating from  
10 vehicles using] SR 125 *may* result in increased municipal water supply  
11 treatment costs at the Perdue Treatment Plant supplied from the  
12 Sweetwater Reservoir[] . . . *may* also cause or contribute to exceedances  
13 of receiving water quality objectives in the receiving waters[] . . . [and]  
14 [s]uch exceedances *may* be considered in the development and  
15 implementation of total maximum daily loads (TMDLs).

16 (Exh. C, IO at p. 3 [Finding 11], emphasis added.)

17 CTV wonders how a regional aerial deposition study would be “needed” to reduce treatment  
18 costs or to assist Sweetwater Authority in avoiding exceedances from nonpoint sources beyond its  
19 jurisdiction and control. It would appear that even the Sweetwater Study it cites cannot reduce the  
20 potential additional costs of treatment or somehow avoid the potential exceedances the Regional Board  
21 foretells.<sup>11</sup> The Regional Board fails to make out a need for a regional aerial deposition study, or how  
22 the proffered alternative Caltrans and CTV’s “partnership” in that study would improve its data  
23 collection or analysis, let alone reduce the costs of treatment or the risk of exceedances that may result  
24 from aerial deposition.

---

25  
26  
27 <sup>11</sup> Even if “partner” means “fund” in the Regional Board’s Alternative Form of Compliance, then the  
28 costs of the study might be reduced, but not the costs to treat the water.

1 SWRCB Policy No. 92-49 authorizes a Regional Board to issue an investigative order based on  
2 Water Code section 13267, subdivision (b) to a facility or landowner with the objective of identifying a  
3 suspected source (or quantifying and characterizing a known source) of pollution. Thus, the ultimate  
4 need for and benefit of such an investigative order would derive from ordering the polluter to “clean up  
5 its act” pursuant to Water Code section 13304.<sup>12</sup> But in this case, the long-term benefit of a regional  
6 aerial deposition study cannot lie in being able to force Caltrans and CTV to pay to mitigate the effects  
7 of “discharges of waste” from brakes and engines on vehicles that will use SR 125 when it opens.

8 First, they do not own, operate, or have any jurisdiction to regulate those vehicles. The  
9 California State Air Resources Board (“CARB”) regulates air pollution from mobile sources such as  
10 motor vehicles. (Health & Saf. Code, § 39002.) CARB also regulates toxic air contaminants such as  
11 metals and organic compounds that form the constituents of aerial deposition. (Health & Saf. Code,  
12 §§ 39658, 39667.)<sup>13</sup>

13 Even assuming purely for the sake of argument that the Regional Board could force Caltrans and  
14 CTV to mitigate the direct aerial deposition effects of vehicles traveling on SR 125, the time to impose  
15 such mitigation measures on Caltrans or CTV for such potential impacts has long since passed.

16 It would not be reasonable to impose the costs of a region-wide aerial deposition study on  
17 Caltrans and CTV based on a future mandate that they have no legal authority to achieve and which the  
18 Regional Board has no legal authority to impose.

19 Finding 11 fails in another way to meet the Regional Board’s burden of showing a “reasonable  
20 relationship” between the costs and benefits of the study: It fails to quantify any of its assumptions.  
21 What is the likelihood that aerial pollutants from vehicles traveling along SR 125 could increase  
22

---

23 <sup>12</sup> See subsections I.A.-B. of State Water Resources Control Board, Policy No. 92-49.

24 <sup>13</sup> Only recently have CARB and the State Water Resources Control Board recognized that the problem  
25 of aerial deposition of contaminants from motor vehicles requires *both of them* to solve it. (See Press  
26 Release, State Water Resources Control Board, Historic Joint Meeting of Two Cal/EPA Boards Focuses  
27 on Air Pollutants that are Transferred to Water (February 10, 2006, SWRCB-06-004), *available at*  
28 [http://www.swrcb.ca.gov/press/docs/2006/06\\_004.pdf](http://www.swrcb.ca.gov/press/docs/2006/06_004.pdf).) The way the meeting is described, CARB and  
the SWRCB appear to be “promoting and pursuing” study of the problem on a statewide basis. Yet the  
Regional Board would seek by way of an Investigative Order to force Caltrans and CTV to do far more.

1 municipal water treatment costs? How much could it increase those costs? What are the relevant  
2 receiving water quality objectives that the Regional Board is concerned about? How much aerial  
3 deposition, and of which contaminants, would be required to cause these potential exceedances? How  
4 long must Caltrans and CTV “partner” with Sweetwater Authority and U.S.G.S. if they were to opt for  
5 the Alternative Form of Compliance?

6 The Regional Board does not say, and it may not know. As argued above, it appears to have  
7 included the Alternative Form of Compliance to placate Sweetwater Authority. (Exh. D, Violation  
8 Letter at p. 2, n.3 (citing the “Letter dated January 9, 2007 to John Robertus . . . from Dennis Bostad,  
9 General Manager, Sweetwater Authority”).)

10 The only possible benefit remaining is to assist the Regional Board in formulating TMDLs that  
11 the Regional Board says it is contemplating for the Sweetwater Reservoir (i.e., metals and organic  
12 chemicals). (Exh. D, Violation Letter at p. 2.) But Sweetwater Reservoir is not listed as impaired  
13 pursuant to section 303(d) of the Clean Water Act (“CWA”) for organic chemicals and metals from  
14 vehicles. (See San Diego Regional Board, *Proposed 2006 CWA Section 303(d) List of Water Quality*  
15 *Limited Segments*, p. 24 (approved by the SWRCB on October 25, 2006, Res. No. 2006-0079), listing  
16 the only “pollutant/stressor” for Sweetwater Reservoir as Dissolved Oxygen from an unknown source  
17 and proposing a TMDL completion of **2019**, available at  
18 [http://www.waterboards.ca.gov/tmdl/docs/303dlists2006/final/r9\\_final303dlist.pdf](http://www.waterboards.ca.gov/tmdl/docs/303dlists2006/final/r9_final303dlist.pdf).) The proposed 2019  
19 TMDL completion date reflects the fact that Sweetwater is ranked **lowest** in priority on the San Diego  
20 Region’s 303(d) list. For instance, the proposed TMDL completion date for a host of other bodies of  
21 water occur in the past or very near future. (See *id.*, *passim*.)

22 At best, the long-term goal to establish TMDLs for Sweetwater Reservoir by 2019 does not  
23 justify requiring Caltrans and CTV to conduct a region-wide aerial deposition study. The Regional  
24 Board has not explained how the benefits of such a study for TMDL development bears a reasonable  
25 relationship with the costs and burdens of designing, funding, implementing and completing such a  
26 study in the two-year time-frame allowed under the Investigative Order. Moreover, since SANDAG is  
27  
28

1 the appropriate regional agency to lead a region-wide study, and has agreed to lead such an effort,<sup>14</sup> the  
2 Investigative Order will accomplish nothing but a wasteful duplication of effort in violation of SWRCB  
3 Policy No. 92-49.

4 Without any evidence in the record to support the Regional Board's assertion that the benefits of  
5 the study bear a reasonable relationship to the costs of the study, the Investigative Order cannot be  
6 issued pursuant to Water Code section 13267, subdivision (b).

7 **2. The Meaning of "Discharge of Waste" for Purposes of Water Code**

8 **Section 13383, Subdivision (a) Does Not Include Direct Aerial Deposition of**  
9 **Air Pollutants Because Aerial Deposition Is a Nonpoint Source of Waste.**

10 Section 13383 of the Water Code appears in chapter 5.5 of division 7. Chapter 5.5 implements,  
11 among other things, the "dredge and fill" permitting scheme of the federal Clean Water Act. (Wat.  
12 Code, § 13370, subd. (a).) Accordingly, "[t]he terms 'navigable waters,' 'administrator,' 'pollutants,'  
13 'biological monitoring,' '*discharge*' and 'point sources' *as used in this chapter shall have the same*  
14 *meaning as in the Federal Water Pollution Control Act* [i.e., the Clean Water Act]...." (Wat. Code,  
15 § 13373.) Under the Clean Water Act, "discharge" is defined to limit its reach to *point sources* of  
16 pollution. (Clean Water Act § 502(12), codified at 33 U.S.C. § 1362(12)(A), defining "discharge," in  
17 relevant part, as "any addition of any pollutant to navigable waters from any point source.")

18 Aerial deposition to bodies of water is a nonpoint source of water pollution.<sup>15</sup> Therefore, the  
19 meaning of "discharge" in Water Code section 13383(a) precludes its application in the present  
20 circumstances.<sup>16</sup>

21  
22 <sup>14</sup> Exh. H, Response to NOV R9-2005-0070 at p. 1; Exh. I, NOV Meeting Minutes at p. 1.

23 <sup>15</sup> Under the Clean Water Act, "point source" means "any discernable, confined and discrete  
24 conveyance" such as a pipe, ditch, channel, tunnel, or conduit. (33 U.S.C. § 1362(14).) The Clean  
25 Water Act does not define nonpoint source pollution, but federal case law interprets it to mean "nothing  
26 more [than] a [water] pollution problem not involving a discharge from a point source." (*Defenders of*  
*Wildlife v. U.S. Environmental Protection Agency* (10th Cir. 2005) 415 F.3d 1121, 1124.)

27 <sup>16</sup> As the Court of Appeal has held, this same limitation on the meaning of "discharge" to point sources  
28 found in chapter 5.5 does not, of course, apply to the term as it is used in *other* chapters of the Water  
Code. (*Lake Madrone Water District v. State Water Resources Control Board* (1989) 209 Cal. App. 3d  
163, 172.)

1                   **3.     Water Code Section 13225, subdivision (c) does not Authorize the Regional**  
2                   **Board to Issue the Investigative Order.**

3                   **a)     Water Code Section 13225, subdivision (c) does not Authorize the**  
4                   **Regional Board to Require Private Entities such as CTV to Conduct**  
5                   **Aerial Deposition Studies.**

6                   Section 13225, subdivision (c) directs the Regional Board to “[r]equire as necessary any *state or*  
7 *local agency to investigate and report on any technical factors involved in water quality control* or to  
8 *obtain and submit analyses of water*” provided the costs and burdens of the report are reasonably  
9 related to the need for the report and the benefits to be obtained from it. (Wat. Code, § 13225, subd. (c),  
10 emphasis added.) First, under no circumstances does this section authorize the Regional Board to  
11 require a *private* entity such as CTV to produce such reports.

12                   **b)     The Regional Board Has Not Shown That the Burdens and Costs of**  
13                   **the Proposed Caltrans/CTV Study Bear a Reasonable Relationship to**  
14                   **the Need and Expected Benefits as Required by Section 13225,**  
15                   **subdivision (c).**

16                   Section 13225, subdivision (c) requires a showing of the same “reasonable relationship” between  
17 the burdens/costs of the study and the need and expected benefits as Water Code § 13267, subdivision  
18 (b). (Wat. Code, § 13225, subd. (c), authorizing a request to a state or local agency “provided that the  
19 burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and  
20 the benefits to be obtained therefrom.”) As explained above, the Investigative Order fails to specify or  
21 quantify any of the alleged benefits or costs of the required regional study, so there is no way to assess  
22 the reasonableness (or lack thereof) of the relationship between the costs and benefits of such a regional  
23 study. Thus, Water Code section 13225, subdivision (c) fails to provide a basis for the Investigative  
24 Order for this independent reason.

1                   **4.       Only an Act of the Legislature Could Authorize Regional Boards to Require**  
2                   **Studies of Aerial Deposition.**

3           The most the legislature has seen fit to empower Regional Water Boards to require with respect  
4 to airborne pollutants is an “analysis” of this potential source of water contamination, and even then  
5 under one narrow circumstance:

6                   A regional board may require a POTW [publicly owned treatment works]  
7 to complete a pollution prevention plan that includes all of the following:  
8                   [¶] An analysis of the methods that could be used to prevent the discharge  
9 of the pollutants into the POTW, including application of local limits to  
10 industrial or commercial dischargers regarding pollution prevention  
11 techniques, public education and outreach, or other innovative and  
12 alternative approaches to reduce discharges of the pollutant to the POTW.  
13 The analysis also shall identify sources, or potential sources, ***not within***  
14 ***the ability or authority of the POTW to control, such as*** pollutants in the  
15 potable water supply, ***airborne pollutants***, pharmaceuticals, or pesticides,  
16 and estimate the magnitude of those sources, to the extent feasible.

17 (Wat. Code, § 13263.3, subd. (d)(3)(B).)

18           The Legislature knows how to authorize Regional Boards to require analysis of sources of  
19 airborne pollutants beyond the control of the regulated entity, yet it has chosen to do so only in one  
20 narrow circumstance. This is strong evidence that Water Code sections 13267, subdivision (b), 13383,  
21 subdivision (a), and 13225, subdivision (c) do not implicitly authorize Regional Boards to compel  
22 Caltrans, let alone a private entity such as CTV, to analyze ***and*** design, fund, and implement regional or  
23 site-specific aerial deposition studies. If they did, there would have been no need for Water Code  
24 section 13263.3, subdivision (d)(3)(B). A Regional Board would already have ample authority to pick  
25 any road upwind from the POTW and required ***its*** owner to do far more than simply “analyze” possible  
26 sources of airborne pollutants that might directly deposit onto the POTW’s holding ponds.

1     **4.     CONCLUSION.**

2           As demonstrated, Caltrans **has** complied with the special condition, so there is no factual basis  
3 for the NOV or the Investigative Order. Instead, the Investigative Order appears to be a pretextual and  
4 unlawful attempt to force Caltrans to fund an ongoing site-specific aerial deposition study that  
5 Sweetwater Authority has been conducting with the assistance of the U.S.G.S. What is worse, the  
6 Regional Board has issued the NOV and Investigative Order to **both** Caltrans **and** CTV. Yet CTV has  
7 no obligation under the special condition at issue, and CTV has no authority to compel Caltrans to  
8 “promote and pursue” a regional aerial deposition study. Imposing fines or other penalties on CTV if  
9 the Regional Board should later find that Caltrans has not complied with its (unlawful) NOV and  
10 Investigative Order would constitute a clear violation of CTV’s right to due process of law.

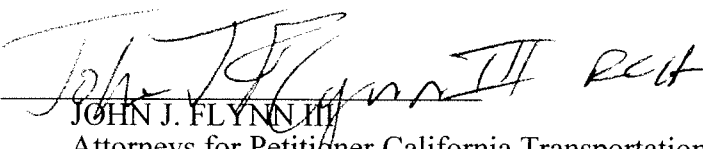
11           Finally, sections 13267, 13383 and 13225 of the Water Code do not provide any legal basis for  
12 the Regional Board to issue an Investigative Order compelling CTV or Caltrans to design, fund,  
13 implement and complete a regional aerial deposition study or, in the alternative, to “partner” with  
14 Sweetwater Authority in its ongoing site-specific study.

15           For the reasons stated above, CTV respectfully requests that the State Water Resources Control  
16 Board review the NOV and Investigative Order and reverse the action by the Regional Board pursuant to  
17 Water Code section 13320, subdivision (c).

18  
19  
20 Dated: July 2, 2007

NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP  
JOHN J. FLYNN III  
ROBERT C. HORTON

21  
22  
23 By:

  
JOHN J. FLYNN III  
Attorneys for Petitioner California Transportation  
Ventures, Inc.

1 **PROOF OF SERVICE**

2 The undersigned declares:

3 I am employed in the County of Orange, State of California. I am over the age of 18 and  
4 am not a party to the within action; my business address is c/o Nossaman, Guthner, Knox &  
Elliott, LLP, 18101 Von Karman Avenue, Suite 1800, Irvine, CA 92612.

5 On July 2, 2007, I served the foregoing **PETITION TO THE STATE WATER  
6 RESOURCES CONTROL BOARD PURSUANT TO WATER CODE SECTION 13320 AND 23  
7 CAL. CODE REGS. SECTION 2050 FROM A NOTICE OF VIOLATION AND  
8 INVESTIGATIVE ORDER ISSUED BY THE CALIFORNIA REGIONAL WATER QUALITY  
9 CONTROL BOARD, SAN DIEGO REGION; MEMORANDUM OF POINTS AND  
10 AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF DAVID HAWLEY; AND  
11 REQUEST FOR STAY** on parties to the within action by placing ( ) the original (X) a true copy  
thereof enclosed in a sealed envelope, addressed as shown below.

12 State Water Resources Control Board  
13 Office of Chief Counsel  
14 Attn: Jeannette L. Bashaw  
Legal Secretary  
1001 "I" Street, 22nd Floor  
Sacramento, CA 95814  
jbashaw@waterboards.ca.gov

California Regional Water Quality  
Control Board, San Diego Region  
Attn: Christina Arias  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123-4340  
carias@waterboards.ca.gov

*(Via E-Mail and U.S. Mail)*

15 (X) (By Electronic Service) By emailing true and correct copies to the persons at the  
16 electronic notification address(es) shown on the accompanying service list. The  
17 document(s) was/were served electronically and the transmission was reported as  
complete and without error.

18 (X) (STATE) I declare under penalty of perjury under the laws of the State of California that  
19 the foregoing is true and correct.

20  
21 \_\_\_\_\_  
22 Robin Golder  
23  
24  
25  
26  
27  
28

1 NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP  
JOHN J. FLYNN III (SBN 76419)  
2 CAROLLYN B. LOBELL (SBN 209933)  
ROBERT C. HORTON (SBN 235187)  
3 18101 Von Karman Avenue, Suite 1800  
Irvine, California 92612-0177  
4 Telephone: (949) 833-7800  
Facsimile: (949) 833-7878  
5

6 Attorneys for Petitioner California Transportation Ventures, Inc.  
7

8  
9 BEFORE THE CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD  
10

11 In the Matter of California Regional Water Quality)  
Control Board, San Diego Region, )  
12 Notice of Violation No. R9-2007-0090 and )  
Investigative Order No. R9-2007-0092, )

**REQUEST FOR STAY**

13 )  
14 CALIFORNIA TRANSPORTATION )  
VENTURES, INC., GENERAL PARTNER OF )  
15 SOUTH BAY EXPRESSWAY, L.P. )

**IN RE: SAN DIEGO REGIONAL WATER  
QUALITY CONTROL BOARD NOTICE OF  
VIOLATION NO. R9-2007-0090 AND  
INVESTIGATIVE ORDER NO. R9-2007-0092**

16 )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

---

1 Pursuant to California Water Code section 13320, and by way of a separate filing, Petitioner  
2 seeks review of the Notice of Violation No. R9-2007-0090 and the Investigative Order No. R9-2007-  
3 0092 (hereinafter referred to as "NOV/IO") issued on June 1, 2007 by the San Diego Regional Water  
4 Quality Control Board.

5 Petitioner requests a Stay of Enforcement of said NOV/IO pursuant to California Code of  
6 Regulations, title 23, section 2053, as follows:

7 1. Petitioner alleges substantial harm to itself will be suffered because the NOV/IO cites  
8 CTV's alleged failure to initiate or participate in a regional air deposition study, (Exh. C, IO at 2  
9 [finding 7], attached to the Petition filed concurrently herewith) but, the 401 condition that required  
10 action related to such a study was explicitly worded as a Caltrans responsibility. There is no  
11 requirement for CTV to promote and pursue a regional air deposition study; therefore, CTV will suffer  
12 substantial harm due to a new requirement being imposed on CTV six years after the 401 certification  
13 was issued.

14 If CTV is required to fund either the aerial deposition study, or to partner with  
15 Sweetwater Authority and the United States Geological Survey in a study as outlined in the IO, CTV  
16 will have to pay substantial sums to conduct or partner in a study, even though the 401 certification  
17 condition is defined as a Caltrans, not CTV, responsibility. (Declaration of David Hawley ("Hawley  
18 Decl.") at ¶ 13.) CTV does not know the costs of either a new study, or partnering in a study, but those  
19 costs could be in the millions of dollars. (Hawley Decl. at ¶ 13.) The alternative form of compliance  
20 requires partnership in a study, an undefined term, and this alternative could also result in a substantial  
21 financial cost to CTV. (Hawley Decl. at ¶ 14)

22 If a stay is not granted, CTV may be subject to substantial fines, even though the 401  
23 certification condition at issue is explicitly defines as one that Caltrans is responsible for implementing.  
24 (Hawley Decl. at ¶ 15) Thus, CTV may be subject to fines for a condition that it cannot implement.  
25 (Hawley Decl. at ¶ 15.) Furthermore, the IO requires CTV to design a regional aerial deposition study  
26 and submit it for review by September 1, 2007, (Exh. C, IO at p. 4) with the first report of data and  
27 analysis by December 10, 2007.

1           2.       Petitioner alleges a lack of substantial harm to other interested persons and to the public  
2 interest if a stay is granted because no discharge is alleged in the NOV/IO. Additionally, the IO alleges  
3 that a regional study is needed to assess the risks to the Sweetwater Reservoir, but it notes that  
4 Sweetwater Authority and the United States Geological Survey are already nine years into a study of the  
5 impacts of aerial deposition on the reservoir that will conclude in 2010. (Exh. C, IO at pp. 2-3.) Thus,  
6 the public will not suffer any harm if the SWRCB stays enforcement of the NOV/IO.

7           Furthermore, the California Air Resources Board and the State Water Resources Control Board  
8 have recognized that they must jointly address the issue of aerial deposition of contaminants from motor  
9 vehicles. (See discussion at footnote 14 in Petitioner's Memorandum of Points and Authorities jointly  
10 filed with this Request for a Stay.) Since the issue is being jointly addressed on a state-wide basis, the  
11 public interest is being appropriately addressed within the time frame established by the agencies for  
12 their joint effort.

13  
14           3.       Petitioner alleges substantial questions of fact or law regarding the disputed action exists.  
15 These issues are explained in detail in Petitioner's Memorandum of Points and Authorities jointly filed  
16 with this Request for a Stay. The issues include the unlawful revocation and reissuance of a special  
17 condition in violation of law and CTV's right to notice and a hearing. The issues also include the  
18 Regional Water Quality Control Board's reliance on California water code sections that do not authorize  
19 them to require Caltrans or CTV to design, fund, and implement a regional aerial deposition study.

20           For the foregoing reasons, Petitioner respectfully requests an immediate Stay of all enforcement  
21 action or other deadlines contained in this NOV/IO be issued pending final resolution or at least 30 days  
22 after this Board has taken final action on the Petition, whichever is later.

23  
24 Dated: July 2, 2007

NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP  
JOHN J. FLYNN III

25  
26 By:  (C&A)  
John J. Flynn III

27  
28 Attorneys for Petitioner  
California Transportation Ventures, Inc.

1 NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP  
JOHN J. FLYNN III (SBN 76419)  
2 CAROLLYN B. LOBELL (SBN 209933)  
ROBERT C. HORTON (SBN 235187)  
3 18101 Von Karman Avenue, Suite 1800  
Irvine, California 92612-0177  
4 Telephone: (949) 833-7800  
Facsimile: (949) 833-7878  
5

6 Attorneys for Petitioner California Transportation Ventures, Inc.  
7

8  
9 BEFORE THE CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD  
10

11 In the Matter of California Regional Water Quality)  
Control Board, San Diego Region, )  
12 Notice of Violation No. R9-2007-0090 and )  
Investigative Order No. R9-2007-0092, )

13 CALIFORNIA TRANSPORTATION )  
14 VENTURES, INC., GENERAL PARTNER OF )  
SOUTH BAY EXPRESSWAY, L.P. )

15 )  
16 Petitioner, )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

**DECLARATION OF DAVID HAWLEY IN  
SUPPORT OF PETITION TO THE STATE  
WATER RESOURCES CONTROL BOARD  
PURSUANT TO WATER CODE SECTION  
13320 AND 23 CAL. CODE REGS.  
SECTION 2050 FROM A NOTICE OF  
VIOLATION AND INVESTIGATIVE ORDER  
ISSUED BY THE CALIFORNIA REGIONAL  
WATER QUALITY CONTROL BOARD, SAN  
DIEGO REGION**

1 I, David Hawley, declare as follows:

2 1. I am the Executive Vice President – Construction for the SR 125 or South Bay  
3 Expressway project. I have full responsibility for construction and I manage the construction  
4 management team. I have been employed by California Transportation Ventures, Inc. /South Bay  
5 Expressway (“CTV/SBX”) since June 2004. I have personal knowledge of the facts set forth herein, or  
6 knowledge gained in the performance of my duties as Executive Vice President, and for which I am held  
7 to account in that capacity. The exhibits submitted in support of the petition are true and correct copies  
8 of the documents they purport to be.

9 2. This declaration provides background on the SR 125 project and identifies the harm to  
10 CTV/SBX.

11 **The SR 125/South Bay Expressway Project**

12 3. In 1959, the State of California added SR 125 to the California Freeway/Expressway  
13 System.

14 4. In 1984, the San Diego Association of Governments (“SANDAG”) added SR 125 to the  
15 San Diego Regional Transportation Plan –the federally-approved twenty year plan for transportation  
16 improvements.

17 5. In 1990, Caltrans selected SR 125 as one of four demonstration projects to be financed,  
18 constructed and operated by private sector developers, pursuant to new legislation (codified at Sts. &  
19 Hy. Code, § 143).

20 6. In 1991, CTV entered into an agreement with Caltrans that granted CTV the exclusive  
21 right to design, build, operate and maintain SR 125.

22 7. In 1993, the Federal Highway Administration included SR 125 in the National Highway  
23 System.

24 8. SR 125 is also an important component of the regional air quality compliance strategy.  
25 SR 125’s traffic capacity, which will relieve congestion and improve air quality, and its provision for  
26 high occupancy vehicle lanes and a median reserved for potential transit uses, are incorporated into the  
27 Regional Transportation Plan, referenced above. This Plan has been found to be in conformity with  
28 Federal Clear Air Act requirements and will contribute to a reduction in air emissions.

1           9.       SR 125 is needed to help achieve the goals of the Regional Transportation Plan, which  
2 include reducing emissions from transportation sources and creating a balanced transportation system by  
3 providing more direct travel routes, thus reducing out of direction travel.

4           10.      The exhaustive environmental review process included an evaluation of 17 conceptual  
5 alignments. The preferred alternative was selected in 1997, after public review and consideration of the  
6 alternatives.

7           11.      After a decade-long environmental review process, all federal, State and local permits  
8 and approvals were obtained for SR 125.

9           12.      SR 125 has been under construction for 4 years, and is scheduled to open in late summer,  
10 2007.

11           **Substantial Harm if a Stay Is Not Granted**

12           13.      If a stay is not granted, CTV/SBX will have to pay substantial sums for an aerial  
13 deposition study even though the 401 certification condition at issue is explicitly defined as one that  
14 Caltrans is responsible for implementing. These sums are undefined, but could be in the millions of  
15 dollars.

16           14.      The Investigative Order provides an alternative form of compliance, which is for Caltrans  
17 to “partner” with Sweetwater Authority in a study that is underway. The term “partner” is undefined  
18 and could result in a substantial financial cost to CTV/SBX.

19           15.      If a stay is not granted, CTV/SBX may be subject to substantial fines, even though the  
20 401 certification condition at issue is explicitly defined as one that Caltrans is responsible for  
21 implementing. Because the 401 certification was issued jointly to Caltrans and CTV, CTV/SBX may  
22 therefore be subject to fines for a condition that it cannot implement.

23           **There Are Substantial Questions of Fact or Law Regarding the Disputed Action**

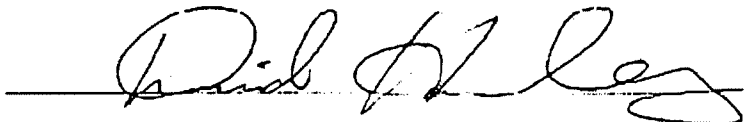
24           16.      As for the third allegation for obtaining a stay, “substantial questions of fact or law  
25 regarding the disputed action,” I refer the State Water Resources Control Board to the Memorandum of  
26 Points and Authorities and Petition submitted by our counsel.

27 ///

28 ///

1 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
2 true and correct.

3 Executed this 2<sup>nd</sup> day of July, 2007 at Carla Vista, California.

4  
5 

6 David Hawley  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# California Regional Water Quality Control Board

## San Diego Region

---

Internet Address: <http://www.swrcb.ca.gov/~rwqcb9/>  
9771 Clairemont Mesa Boulevard, Suite A, San Diego, California 92124-1324  
Phone (858) 467-2952 • FAX (858) 571-6972

### Action on Request for Clean Water Act section 401 Water Quality Certification for Discharge of Dredged and/or Fill Materials

---

**PROJECT:** State Route 125 South Toll Road (File No. 99C-133)

**APPLICANT:** Mr. Bruce April  
California Dept. of Transportation (Caltrans)  
P.O. Box 85406  
San Diego, CA 92186-5406

Mr. Kent Olsen  
California Transportation Ventures (CTV)  
707 Broadway, Suite 1600  
San Diego, CA 92101

#### **ACTION:**

1. ☐ Order for Standard Certification
2. ☒ Order for Technically-conditioned Certification
3. ☐ Order for Denial of Certification

#### **STANDARD CONDITIONS:**

The following three standard conditions apply to all certification actions, except as noted under Condition 3 for denials (Action 3).

1. This certification action is subject to modification or revocation upon administrative or judicial review, including review and amendment pursuant to section 13330 of the California Water Code and section 3867 of Title 23 of the California Code of Regulations (23 CCR).
2. This certification action is not intended and shall not be construed to apply to any discharge from any activity involving a hydroelectric facility requiring a Federal Energy Regulatory Commission (FERC) license or an amendment to a FERC license unless the pertinent certification application was filed pursuant to 23 CCR subsection 3855(b) and the

---

*California Environmental Protection Agency*

Recycled Paper



application specifically identified that a FERC license or amendment to a FERC license for a hydroelectric facility was being sought.

3. The validity of any non-denial certification action (Actions 1 and 2) shall be conditioned upon total payment of the full fee required under 23 CCR section 3833, unless otherwise stated in writing by the certifying agency.

### **SPECIAL CONDITIONS:**

This 401 Water Quality Certification applies to temporary and permanent fill associated with the construction of the project as proposed, and with the implementation of this project after build-out for the life of the project.

The 401 Water Quality Certification from the Regional Water Quality Control Board, San Diego Region (Regional Board) applies only to the four-lane freeway and the following interchanges: Otay Mesa Road, Olympic Parkway, Telegraph Canyon / Otay Lakes Road, and East H Street.

The 401 Water Quality Certification does not apply to 1) future lane additions, 2) the freeway to freeway interchange with Route 905, 3) the construction of proposed local interchanges with Lonestar Road, future Rock Mountain Road, and future Birch Parkway, 4) the construction of the proposed extension of La Media Road and the second bridge structure at Otay River Valley and 5) the two additional bridges over the Sweetwater River Valley.

To the extent that such additional construction associated with this project requires any federal permit, license, or approval, Caltrans and California Transportation Ventures shall submit new applications for 401 water quality certification.

Caltrans shall promote and pursue a regional air deposition study that will include the Sweetwater Reservoir Airshed.

### **A. Responsible Parties**

1. The California Department of Transportation (Caltrans) and California Transportation Ventures (CTV) shall be individually responsible for complying with this certification.

2. Caltrans and CTV are considered to have full responsibility for correction of any and all problems that arise in the event of a failure which results in an unauthorized release of waste or wastewater. In the event of an inability to determine individual responsibility for a particular discharge, Caltrans shall be responsible for correcting any and all problems arising from such a discharge.

### **B. Construction**

1. Caltrans and CTV shall, at all times, fully comply with the engineering plans, specifications and technical reports submitted with Caltrans' application for 401 Water Quality Certification and all subsequent submittals required as part of this certification. Subsequent submittals to the Regional Board will enable staff to review all changes pertaining to ultimate discharge points from the project and BMP structural controls prior to their construction.
2. Regional Board approved Biological Monitors shall be present during construction and grading to verify that appropriate protocols are followed and that construction remains within the permitted areas for all aquatic resources. Biological Monitors shall be present for a minimum of 4 hours per day when road construction or grading is occurring in or adjacent to "waters of the U.S." and for a minimum of 4 hours per week when grading is occurring elsewhere on the project. Semi-annual updates from the Biological Monitors shall be sent to the Regional Board for review.
3. In accordance with Section 13260 of the CWC, Caltrans and CTV shall file with the Board a report of any material change or proposed change in the character, location, or quantity of this waste discharge. Any proposed material change in operation shall be reported to the Executive Officer at least 30 days in advance of the proposed implementation of any change. This shall include, but not be limited to, all significant additional unforeseen grading, all proposed expansion of development, or any change in the ultimate discharge locations. For the purpose of this 401 Certification, this includes any proposed change in the boundaries of the wetland or streambed fill sites.

In addition, in accordance with Water Quality Order No. 99-08-DWQ, Section A, 4a., "The discharger shall amend the SWPPP whenever there is a change in construction or operations which may affect the discharge of pollutants to surface waters, ground waters, or a municipal separate storm sewer system (MS4). The SWPPP shall also be amended if the discharger violates any condition of this General Permit or has not achieved the general objective of reducing or eliminating pollutants in storm water discharges. If the Regional Board determines that the discharger is in violation of this General Permit, the SWPPP shall be amended and implemented in a timely manner, but in no case more than 14-calendar days after notification by the Regional Board. All amendments should be dated and directly attached to the SWPPP."

4. Prior to discharge, Caltrans and CTV shall notify the Regional Board of any plans to discharge ground water or other non-storm water that has accumulated in utility trenches or in other portions of the project, as this action may require a separate permit, unless the discharge is treated by a structural BMP prior to discharge from the project site.

### **C. Project Design**

1. Caltrans and CTV shall design the project to ensure that there will be no increase in the existing peak flow rate of a 25-year, 6-hour frequency storm event from the project site to prevent flows from exceeding pre-development values.

2. Jurisdictional waters of the U.S. that are crossed by roadways associated with the project shall have a bridge or culvert that will accommodate a 100-year storm event.

3. Bridges or culverts on San Miguel Creek (Sta 166+50) or at Proctor Valley Road (Sta 147+00) shall be of sufficient width to provide velocities that will not require any hardscape downstream to attenuate flows. If culverts are used at these sites, the natural streambed within the culvert shall not be hardscaped. (Arch culverts may be used at these sites. Hardscape material may be placed immediately upstream of the culvert to prevent undercutting.)

#### **D. Storm Water Compliance**

1. Caltrans and CTV shall comply with the requirements of the State Water Resources Control Board Order No. 99-06-DWQ. Prior to approval of Caltrans' Storm Water Management Plan (SWMP) Caltrans and CTV shall comply with the requirements of Regional Board Order No. 97-08.

2. Caltrans and CTV shall comply with the State Water Resource Control Board Order No. 99-08-DWQ, General Permit for Storm Water Discharges Associated with Construction Activity.

3. Caltrans and CTV shall submit their Storm Water Pollution Prevention Plan (SWPPP) for the project at least 30 days prior to the beginning of construction.

4. Caltrans and CTV shall employ all appropriate standard BMPs to reduce or eliminate pollutants in storm water discharges from the construction sites to the Best Available Technology Economically Achievable (BAT) and Best Conventional Pollutant Control Technology (BCT). At a minimum erosion control BMPs shall be designed for a 2-year, 6-hour rain event, and sediment control basins shall be designed in accordance with the General Construction Permit, Water Quality Order No. 99-08-DWQ, Section A, No. 8.

5. Caltrans and CTV shall cover exposed slopes with appropriate BMPs within 14 days of completion of the slope. The minimum slope incline to be covered shall be at 10:1. Clearing or grading shall occur at a minimum needed only to facilitate the active phase of the project. Landscaping of each segment between interchanges must be initiated prior to the start of grading or construction of the next phase of the project, unless the next phase of the project requires soil disturbance to balance earthwork. If this is the case, then appropriate soil stabilization controls shall be deployed within 14 days from the cessation of soil-disturbing activities or one day prior to the onset of precipitation, whichever occurs first.

6. Caltrans and CTV shall plant permanent landscape material and begin irrigation within one year of ground disturbances. The areas between future Olympic Parkway (Orange Ave.) and Route 54 shall be completely landscaped with appropriate irrigation by opening day of this section of the toll road.

7. Caltrans and CTV shall use post-construction BMP devices that best meet the maximum extent practicable (MEP) performance standard. Post-construction BMPs shall be designed to meet at least a 80% efficiency removal rate for total metals, and at least an 80% efficiency removal rate for Total Suspended Solids (TSS)/sediments. BMPs shall be designed to remove oil & grease, pathogens, and trash to the maximum extent practicable. There shall be no net increase in nutrient concentrations from the BMPs.
8. Caltrans and CTV shall ensure funding for maintenance for features necessary to satisfy conditions of water quality certification; such funding shall be first priority for any allocation of revenue from tolls collected.

### E. Storm Water and Receiving Water Monitoring

1. Caltrans and CTV shall implement a monitoring program that ensures removal effectiveness standards are met from the project at discharge points below BMPs at five sites (located in tributary drainage areas 2, 9, 13, 15, & 18, See Table 1) during all specified rain events, and at five discharge locations downstream of the BMPs that are randomly selected for each specified rain event. Tributary drainage areas are identified in the "State Route 125 Toll Road Water Quality Data and Best Management Practices Evaluation" document, received on February 26, 2001. Monitoring shall occur during all storm events with a rainfall totals of 0.25 inches at 75% probability, beginning when construction starts (for construction BMPs that are in use and for permanent BMPs that have been installed and are in use). Monitoring shall continue for at least five years following project construction completion. Five years after construction completion Caltrans and CTV may make a request to the Regional Board that water quality monitoring be discontinued or that the monitoring program be changed. The storm event must be preceded by an antecedent dry period of a minimum of 48 hours, with a period of 72 hours preferred. For safety reasons, no monitoring shall occur starting 6 p.m. December 24<sup>th</sup> and ending 6 a.m. December 26<sup>th</sup> and also starting 6 p.m. December 31 and ending 6 a.m. January 2<sup>nd</sup> of each year.

Table 1. State Route 125 Sampling locations

Trib. Area	To	From	Selected BMP	Tributary Area Hectares	Reasoning
	Stations				
2	44+00	65+00	EDB	14.1	discharges to La Media Road and ultimately to Otay.
9	116+00	120+50	Treatment Train	6.23	discharging to Telegraph, treatment train sampling will give us effectiveness of combination.
13	139+00	142+20	Bioswale + SFD	2.6	discharges to H St. and it is a bioswale with a SFD combination, effectiveness has not been fully determined for this treatment train.
15	147+80	161+00	SFD	21.86	Large CDS unit - will provide supporting data statewide.
18	178+20	196+00	SFD	15.5	end of project, some of flow could be due to SR54 traffic.

SFD- Small Footprint Device

Discharges from BMPs shall be monitored for, but not limited to chromium, copper, lead, nickel, zinc, pH, total suspended solids, total dissolved solids, nitrate, ammonia, orthophosphorus, total phosphorus, oil & grease, total polycyclic aromatic hydrocarbons, fecal coliform, total coliform, and any pesticides that are used at the project site.

Receiving waters located on the Otay and Sweetwater Rivers shall be sampled quarterly for water quality and annually for sediment quality. Monitoring shall begin when construction starts and continue for at least five years following project construction completion. Five years after construction completion Caltrans may make a request to the Regional Board that water quality monitoring be discontinued or that the monitoring program be changed. Receiving waters shall be monitored for the constituents listed above as well as acute toxicity, temperature and dissolved oxygen. Sediments shall be monitored for, but not limited to, acute toxicity, aluminum, cadmium, chromium, copper, lead, nickel, zinc, total polycyclic aromatic hydrocarbons, oil & grease, and any pesticides that are used at the project site.

2. Annual monitoring reports and semi-annual updates with the analysis results shall be submitted to the Regional Board.
3. Caltrans and CTV shall submit a final water and sediment quality monitoring plan to the Regional Board for review 30 days prior to construction or grading.
4. All construction BMPs shall be inspected before and after each storm event and once every 24 hours during extended storm events to verify BMP effectiveness and implement repairs or design changes as soon as feasible.
5. All post-construction BMPs shall be inspected at least monthly, and after each rain event of 0.25 inches at 75% probability, and weekly during extended periods of wet weather to ensure that they are functioning properly for the life of the project.
6. Each inspection shall be documented. Annual inspection summary reports including inspection, maintenance, and repair information shall be submitted to the Regional Board by April 1st of each year for the previous calendar year, and may be incorporated into the Caltrans Annual Report submitted as required by Order 99-06.

#### **F. Mitigation for Wetland and Streambed Losses**

1. Prior to grading the project areas, the Caltrans and CTV shall execute and record a perpetual conservation easement in a form acceptable to the U.S. Fish & Wildlife Service (USFWS) for biological conservation purposes. The conservation easement or other legal limitation on the mitigation property shall be adequate to demonstrate that the site will be maintained without future development or encroachment on the site or which could otherwise reduce the functions and values of the site for the variety of beneficial uses of waters of the U.S. that it supports. The conservation easement or other appropriate legal limitation which shall prohibit, without exception, all residential, commercial, industrial, institutional, and transportation development,

and any other infrastructure development that would not maintain or enhance the wetland functions and values of the site. Other infrastructure development to be prohibited includes, but is not limited to, additional utility lines, paved maintenance roads, and areas of maintained landscaping for recreation.

2. Caltrans and CTV shall submit a Conceptual Restoration and Management Plan, as required by the USFWS Biological Opinion, for all mitigation no later than 30 days prior to the start of construction or grading of the project and shall submit a Final Restoration and Management Plan for all mitigation no later than 30 days prior to the start of construction of the mitigation site(s).
3. Caltrans and CTV shall submit annual mitigation monitoring reports to the Regional Board by April 1st of each year for the previous calendar year.
4. In addition to the proposed vernal pool mitigation of 0.70 acres of pool basin area (2:1 ratio) on a 12 acre site on Otay Mesa, Caltrans and CTV shall preserve and/or enhance an additional 0.32 acres of vernal pools (2:1 ratio for impacts to functional pools on Otay Mesa) to be located on Otay Mesa in perpetuity, and shall preserve the associated watershed for each basin in perpetuity.

#### **G. Discharge Prohibitions**

1. The direct discharge of wastes, including trash/ litter, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plains, is prohibited.
2. The discharge of floating oil or other floating materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters is prohibited.
3. The discharge of silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters is prohibited.
4. The discharge of decant water from active dredging or fill sites, or from dredged material stockpile or storage areas to surface waters or surface water drainage courses, is prohibited, except as conditionally allowed following the submittal of a discharge plan.
5. The groundwater in the vicinity of the project shall not be degraded as a result of the placement of fill for the project.
7. The discharge of materials other than storm water, which are not otherwise regulated by a separate NPDES permit or allowed by this Certification, to "waters of the U.S." or "waters of the State" are prohibited.

8. The discharge of drilling mud to "waters of the U.S." or "waters of the State" is prohibited.

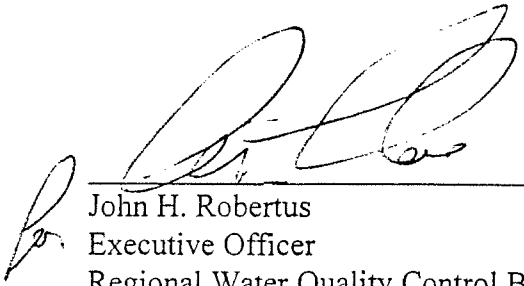
**REGIONAL WATER QUALITY CONTROL BOARD CONTACT PERSON:**

Cynthia Gorham-Test  
California Regional Water Quality Control Board, San Diego Region  
9771 Clairemont Mesa Blvd., Suite A  
San Diego, CA 92124  
858-467-4285

**WATER QUALITY CERTIFICATION:**

I hereby certify that the proposed discharge from the **State Route 125 South Toll Road** (File No. 99C-133) will comply with the applicable provisions of sections 301 ("Effluent Limitations"), 302 ("Water Quality Related Effluent Limitations"), 303 ("Water Quality Standards and Implementation Plans"), 306 ("National Standards of Performance"), and 307 ("Toxic and Pretreatment Effluent Standards") of the Clean Water Act. Should new information come to our attention that indicates a water quality problem, the Regional Board may issue waste discharge requirements at that time.

Except insofar as may be modified by any preceding conditions, all certification actions are contingent on (a) the discharge being limited and all proposed mitigation being completed in strict compliance with the applicants' project description and/or on the attached Project Information Sheet, and (b) on compliance with all applicable requirements of the Regional Water Quality Control Board's Water Quality Control Plan (Basin Plan).



John H. Robertus  
Executive Officer  
Regional Water Quality Control Board

7/27/01  
Date

Attachments 1 and 2

**ATTACHMENT 1  
PROJECT INFORMATION**

Applicant: Mr. Bruce April  
California Dept. of Transportation  
P.O. Box 75406  
San Diego, CA 92186-5406  
Phone: 619-688-6754  
Fax: 619-688-3192

Applicant  
Representatives: Same

Project Name: State Route 125 South Toll Road (File No. 99C-133)

Project Location: The proposed project is located in southeastern San Diego County east of Chula Vista. The road extends approximately 11 miles in a north-south direction from Otay Mesa Road (Route 905) to Spring Valley Road (Route 54). The project site is situated within the USGS 7.5 minute Otay Mesa, CA and Jamul Mountains, CA quadrangles.

Type of Project: Freeway and Interchanges

Project Description: The proposed project consists of construction of a four-lane freeway (with plans for expansion to eight-lanes) extending from Otay Mesa Road (Route 905) to Spring Valley Road (Route 54). The following interchanges are included in this project: Otay Mesa Road, Olympic Parkway, Telegraph Canyon / Otay Lakes Road, and East H Street

Federal Agency/Permit: U.S. Army Corps of Engineers, Individual Permit, Terry Dean

Other Required Regulatory Approvals: California Department of Fish and Game Streambed Alteration Agreement, Don Chadwick

California Environmental Quality Act (CEQA) Compliance: Caltrans approved the Final Environmental Impact Report (SCH No. 89011118) on December 30, 1999 and the Federal Highway Administration approved the Report on January 21, 2000.

Receiving Water: Sweetwater Rivers, Otay Rivers, San Miguel Creek, Spring Valley Creek, and Unnamed tributary of San Miguel Creek.

Impacted Waters of the United States:	Implementation of the proposed project will permanently impact 5.61 acres of wetlands and 2.15 acres of streambed. In addition, the project would temporarily impact 5.13 acres of wetlands.
Dredge Volume:	166,387 cubic yards
Related Projects Implemented/to be Implemented by the Applicant(s):	Within the next five years, no additional projects are scheduled to be implemented, however, there are future plans to expand the freeway from four to eight lanes and to add additional interchanges to the highway.
Avoidance/Minimization Measures:	General site layout has resulted in avoidance and minimization at many wetland/ streambed locations. Negotiations have included re-routing the freeway to avoid vernal pools.
Compensatory Mitigation:	<p>Impacts to waters of the U.S. are addressed in Section 4.6 of the FEIS dated January 2000, and in the Biological Assessment dated January 8, 1999. Mitigation for permanent wetlands impacts will include restoration of 15.78 acres of vireo quality habitat (ratio of 3:1) at one of the two sites: Dulzura Creek on Daley Ranch, or Otay River on Otay Ranch. Mitigation for temporary wetlands impacts will include 4.15 acres at the Otay River Bridge crossing and 0.98 acres at Sweetwater Bridge crossing of onsite restoration of non-vireo quality habitat. Mitigation for the fill of unvegetated streambed will include 2.15 acres of vireo quality habitat at Dulzura Creek on Daley Ranch, or Otay River on Otay Ranch. Mitigation for vernal pool impacts will involve restoration of 0.38 and 0.32 acres (2:1 ratio) of vernal pool surface area and supporting upland habitat on 12 acres of mitigation site on Otay Mesa.</p> <p>In addition to the above mitigation requirements this Certification has a special condition requiring that, Caltrans and CTV shall preserve and/or enhance an additional 0.32 acres of vernal pools (2:1 ratio for impacts to pools on Otay Mesa) located on Otay Mesa in perpetuity and shall preserve the associated watershed for each basin in perpetuity.</p>
Best Management Practices:	<p>Construction BMPs are described in the FEIS dated January 2000. Post-construction BMPs are described in the document: "State Route 125 Toll Road Water Quality Data and Best Management Practices Evaluation".</p> <p>Special conditions concerning BMPs are included in this certification. Caltrans storm water permits must be followed at all times. The General Construction storm water permit must be followed at all times.</p>

**ATTACHMENT 2  
DISTRIBUTION LIST**

Mr. Terry Dean, U.S. Army Corps of Engineers, San Diego Field Office

Mr. Paul Michel, U.S. Environmental Protection Agency, Region 9

Ms. Allison Rolfe, Audubon Society of San Diego

Mr. Tim Stevens, State Water Resources Control Board, Division of Water Quality



Linda S. Adams  
Secretary for  
Environmental Protection

# California Regional Water Quality Control Board

## San Diego Region

Over 50 Years Serving San Diego, Orange, and Riverside Counties  
Recipient of the 2004 Environmental Award for Outstanding Achievement from USEPA



Arnold Schwarzenegger  
Governor

9174 Sky Park Court, Suite 100, San Diego, California 92123-4353  
(858) 467-2952 • Fax (858) 571-6972  
[http:// www.waterboards.ca.gov/sandiego](http://www.waterboards.ca.gov/sandiego)

June 1, 2007

### **IN THE MATTER OF:**

Mr. Pedro Orso-Delgado  
District Director  
Department of Transportation, District 11  
4050 Taylor Street  
San Diego, CA 92110

Mr. Greg Hulsizer  
Chief Executive Officer  
South Bay Expressway, LP  
California Transportation Ventures, Inc.  
880 Kuhn Drive  
Chula Vista, CA 91914

### **NOTICE OF VIOLATION NO. R9-2007-0090**

**CWA §401 Water Quality  
Certification No.**

**99C-133**

In reply refer to:  
**WPS: 18-1999133.02:ariac**

**Subject Sites: South Bay Expressway (SR-125 South)**

### **YOU ARE HEREBY NOTIFIED THAT:**

**VIOLATION OF CLEAN WATER ACT §401 WATER QUALITY CERTIFICATION NO. 99C-133 FOR THE SOUTH BAY EXPRESSWAY (SR-125 SOUTH).**

Such violation subjects you to possible enforcement action by the California Regional Water Quality Control Board, San Diego Region (Regional Board). California Water Code (CWC) Section 13350 states, in part, "(a) Any person who (2) in violation of any waste discharge requirement, waiver condition, **certification**, or other order or prohibition issued, re-issued, or amended by a regional board... shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e)." Section (e) states, in part, (1) "The civil liability on a daily basis may not exceed five thousand dollars (\$5,000) for each day the violation occurs." Further, section (e) (1) (B) states "When there is no discharge, but an order issued by the Regional Board is violated... the civil liability shall not be less than one hundred dollars (\$100) for each day in which the violation occurs."

NOTICE OF VIOLATION NO. R9-2007-0090

**Findings:**

1. On April 23, 2001, the Regional Board adopted Resolution No. 2001-51 approving Clean Water Act §401 Water Quality Certification for the State Route 125 South Toll Road Project (Resolution). This Certification was issued to the California Department of Transportation (Caltrans), and California Transportation Ventures (CTV), the applicants, provided they would adhere to the stated conditions in the Order. On page no. 2 of the Resolution, a special condition states that "Caltrans shall promote and pursue a regional air deposition study that will include the Sweetwater Reservoir Airshed."
2. In a letter dated November 5, 2001 to Mr. Charles Stoll, Deputy District Director for Caltrans District 11, the Regional Board described the expectation that Caltrans would comply with the special condition. This expectation included taking "an active, rather than a passive, role in the design and implementation of a study that would include actual measurements of the deposition of air pollutants in a region that includes the Sweetwater Reservoir Airshed."
3. In a report dated March 30, 2007, Caltrans reported that it has complied with the special condition, and describes their activities to date. Activities include developing a research proposal in 2005 with the assistance of the University of California, Davis, and the San Diego Association of Governments to address regional-scale cross-media impacts from on-road mobile source emissions. In February 2006, a Caltrans representative attended a workshop held by the California Air Resources Board and State Water Resources Control Board to discuss air pollutant deposition, stormwater runoff, and impacts to water bodies.

**Summary of Violation:**

**FAILURE TO PROMOTE AND PURSUE A REGIONAL AIR DEPOSITION STUDY**

The Regional Board review of the 401 Certification and supporting documents (file number 18-1999133.02) revealed no evidence that a regional air deposition study consisting of actual measurements of the deposition of air pollutants had been initiated by Caltrans and CTV, nor that Caltrans and CTV have participated on any ongoing regional air deposition study that includes the Sweetwater Reservoir Airshed. For these reasons, the Regional Board finds Caltrans and CTV to be in violation of the special condition described in the Resolution.

The heading portion of this letter includes a Regional Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence please

Mr. Orso-Delgado

- 3 -

June 1, 2007

Mr. Hulsizer

NOTICE OF VIOLATION NO. R9-2007-0090

include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter.

  
\_\_\_\_\_  
JOHN H. ROBERTUS  
Executive Officer

  
\_\_\_\_\_  
Date

JHR:mm:dg:ca



# California Regional Water Quality Control Board

## San Diego Region

Over 50 Years Serving San Diego, Orange, and Riverside Counties

Recipient of the 2004 Environmental Award for Outstanding Achievement from USEPA

Linda S. Adams  
Secretary for  
Environmental Protection

9174 Sky Park Court, Suite 100, San Diego, California 92123-4340  
(858) 467-2952 • Fax (858) 571-6972  
<http://www.waterboards.ca.gov/sandiego>



Arnold Schwarzenegger

Governor

SBX  
RECEIVED

JUN 07 2007

June 1, 2007

### CERTIFIED MAIL

7007-0220-0000-4691-0510

In reply refer to:

**WPS: 18-1999133.02:ariac**

Mr. Pedro Orso-Delgado  
District Director  
Department of Transportation, District 11  
4050 Taylor Street  
San Diego, CA 92110

INVESTIGATIVE ORDER NO. R9-2007-0092  
REQUEST FOR REGIONAL AERIAL DEPOSITION STUDY INCLUDING THE  
SWEETWATER RESERVOIR AIRSHED

Dear Mr. Orso-Delgado and Mr. Hulsizer:

Enclosed is Investigative Order No. R9-2007-0092 (Order) of the California Regional Water Quality Control Board, San Diego Region (Regional Board) concerning an aerial deposition study that is required to comply with the special condition in Clean Water Act §401 Water Quality Certification No. 99C-133, which was issued on April 25, 2001. This Investigative Order is issued pursuant to California Water Code (CWC) sections 13225, 13267, and 13383 and directs you to submit a study plan and monitoring reports associated with a regional aerial deposition study to include the Sweetwater Reservoir Airshed.

Please note the requirements contained within the Order. Specifically, all technical reports submitted to the Regional Board shall be accompanied by the certification, under penalty of law, that the information is true, accurate, and complete.

Failure to meet the requirements may subject you to further enforcement action by the Regional Board, including administrative civil liability pursuant to CWC sections 13268 and 13385. Any request for extensions of submittal dates must be submitted in writing and are denied absent written approval of the Executive Officer of the Regional Board.

The heading portion of this letter includes a Regional Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence please include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter.

*California Environmental Protection Agency*

Recycled Paper



Mr. Orso-Delgado

- 2 -

June 1, 2007

Mr. Hulsizer

NOTICE OF INVESTIGATIVE ORDER NO. R9-2007-0092

Questions regarding this Notice should be directed to Ms. Christina Arias. She may be reached by phone at (858) 627-3931, or email at [carias@waterboards.ca.gov](mailto:carias@waterboards.ca.gov). Written correspondence pertaining to this Notice should be sent via email to Ms. Arias.

Respectfully,



JOHN H. ROBERTUS

Executive Officer

San Diego Regional Water Quality Control Board

JHR:mm:dg:ca

Cc:

Mr. Greg Hulsizer

Chief Executive Officer

South Bay Expressway, LP

California Transportation Ventures, Inc.

880 Kuhn Drive

Chula Vista, CA 91914

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION

INVESTIGATIVE ORDER NO. R9-2007-0092

FOR

Department of Transportation, District 11  
4050 Taylor Street  
San Diego, CA 92110

AND

California Transportation Ventures, Inc.  
880 Kuhn Drive  
Chula Vista, CA 91914

The California Regional Water Quality Control Board, San Diego Region (hereinafter Regional Board), finds that:

1. California Water Code Sections 13267(b) and 13383 contain criteria that allow the Regional Board to conduct investigations and to establish technical, monitoring, inspection, entry, reporting, and record keeping requirements from any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste in accordance with the conditions in the section.
2. California Water Code Section 13225(c) directs the Regional Board to require local agencies to investigate and report on any technical factors involved in water quality control or to obtain and submit analyses of water.
3. On April 23, 2001, the Regional Board adopted Resolution No. 2001-51 approving Clean Water Act §401 Water Quality Certification for the State Route 125 South Toll Road Project (Resolution). This Resolution was issued to the California Department of Transportation (Caltrans), and California Transportation Ventures (CTV), the applicants, provided they would adhere to the stated conditions in the Order. On page no. 2 of the Resolution, a special condition states that "Caltrans shall promote and pursue a regional aerial deposition study that will include the Sweetwater Reservoir Airshed."
4. The Resolution requirements that were considered and adopted by the Regional Board were based on testimony provided during the public hearing on the matter. At the public hearing on April 23, 2001, Mr. Gary Gallegos, Caltrans District 11

*California Environmental Protection Agency*

*Recycled Paper*



Director, stated "We are committed to being a part of a regional study that would look [at] what the impacts of airborne pollutants would have on drinking water. And we think it would be a broad regional study that may be looked, the whole San Diego region, and we would commit to being a part of that."<sup>1</sup>

5. In a letter dated November 5, 2001 to Mr. Charles Stoll, Deputy District Director for Caltrans District 11, the Regional Board described the expectation that Caltrans would comply with the special condition. This expectation included taking "an active, rather than a passive, role in the design and implementation of a study that would include actual measurements of the deposition of air pollutants in a region that includes the Sweetwater Reservoir Airshed."
6. In a report dated March 30, 2007, Caltrans reported that it has complied with the special condition, and describes their activities to date. Activities include developing a research proposal in 2005 with the assistance of the University of California, Davis, and the San Diego Association of Governments to address regional-scale cross-media impacts from on-road mobile source emissions. In February 2006, a Caltrans representative attended a workshop held by the California Air Resources Board and State Water Resources Control Board to discuss aerial pollutant deposition, stormwater runoff, and impacts to water bodies.
7. The Regional Board review of the 401 Certification and supporting documents (file number 18-1999133.02) revealed no evidence that a regional aerial deposition study consisting of actual measurements of the deposition of aerial pollutants has been initiated by Caltrans and CTV. Nor is it evident that Caltrans and CTV have participated in any ongoing regional aerial deposition study that includes the Sweetwater Reservoir Airshed. For these reasons, the Regional Board finds Caltrans and CTV to be in violation of the special condition described in the Resolution.
8. An aerial deposition study is needed because it is unknown if aerially deposited metals or other pollutants from SR-125 are contaminating waterways. Preliminary results from a recent regional aerial deposition study<sup>2</sup> indicate that elevated levels of copper and zinc are found in areas that are in proximity to industrial and **transportation** land uses. Study authors state that if a continual source, such as automobiles, is emitting large particulates, these particulates may travel great distances given a long enough time and with enough wind to mobilize them. Modeling results show that the greatest local deposition of brake wear particles would be expected within approximately 250 meters of a roadway,

---

<sup>1</sup> Audio tapes for Regional Board meeting, April 23, 2001. Tape 3, side B.

<sup>2</sup> *City of San Diego Aerial Deposition Study Draft Summary Progress Report*. Weston Solutions, September 11, 2006.

and that total deposition rates decrease to 1/100 of their maximum values approximately 3 km from the roadway.

9. SR-125 runs in close proximity to the Sweetwater Reservoir and the Sweetwater River; aerially-born metals and other pollutants from this roadway may be deposited from SR-125 onto the surfaces of the Sweetwater River and Reservoir.
10. In accordance with California Water Code section 13267 (b) these findings provide Caltrans with a written explanation with regard to the need for an aerial deposition study and identify the evidence that supports the requirement to submit such a study.
11. Pollutant loading from SR-125 may result in increased municipal water supply treatment costs at the Perdue Treatment Plant supplied from the Sweetwater Reservoir. Pollutant loadings from SR 125 may also cause or contribute to exceedances of receiving water quality objectives in the receiving waters. Such exceedances may be considered in the development and implementation of total maximum daily loads (TMDLs). The costs associated with the aerial deposition study are therefore justified.
12. This action is being taken for the protection of the environment and, as such, is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 2100 Et seq.) in accordance with Section 15108, Chapter 3, Title 14, California Administrative Code.

**IT IS HEREBY ORDERED** that, pursuant to Sections 13225, 13267, and Section 13383 of Division 7 of the California Water Code, Caltrans shall conduct an aerial deposition study and shall prepare and submit periodic monitoring and technical reports to the Regional Board.

- 1) The technical reports shall contain, but not be limited to, the following information:
  - a) **Aerial Deposition Data Collection and Assessment.** A study design, followed by quarterly monitoring reports shall be submitted to the Regional Board to assess, at a minimum, the effects of the construction of SR-125 onto the Sweetwater River and Reservoir. Each report shall contain raw and summary data and an assessment of the fate and transport of a representative suite of airborne pollutants associated with vehicle exhaust. Each report shall include data in tabular and graphical form, and electronic data shall be submitted to the Regional Board upon request. A certified contract laboratory shall perform all sampling, laboratory, quality assurance, and analytical procedures.
  - i) Caltrans shall propose monitoring stations that would be used to assess whether or not pollutants from the SR-125 are transported to the Sweetwater

River and Reservoir. The monitoring stations shall include at least one location upwind of SR-125 (or other suitable reference site), at least one location downwind of SR-125 and upwind of Sweetwater River, and at least one location downwind of SR-125 and upwind of Sweetwater Reservoir, along the transect of the predominant wind direction.

- ii) Aerial deposition data shall be obtained, analyzed, and reported for the purpose of completing the assessment described in item (a) above. Measurements should include, but not be limited to, the following constituents at the following frequencies<sup>3</sup>:

Parameter	Reporting Unit	Monitoring Frequency
A representative suite of Volatile Organic Compounds (VOCs)	$\mu\text{g}/\text{m}^2/\text{day}$	Composite sample collected at least once per month
A representative suite of Polycyclic Aromatic Hydrocarbons (PAHs)	$\mu\text{g}/\text{m}^2/\text{day}$	Composite sample collected at least once per month
Trace metals: copper, lead, zinc	$\mu\text{g}/\text{m}^2/\text{day}$	Composite sample collected at least once per month

Note:  $\mu\text{g}/\text{m}^2/\text{day}$  = micrograms per square meter per day

- iii) Caltrans may propose water and/or sediment sampling to supplement aerial deposition samples for the purpose of completing the assessment described in item (a) above.
- 2) **Report Schedule.** The study design shall be submitted to the Regional Board no later than September 1, 2007. For subsequent reports, the report period will be quarterly, with the report of data and analysis due to the Regional Board no later than the 10<sup>th</sup> day of the month beginning December 10, 2007.
- 3) **Final Report.** A final report shall be submitted by June 30, 2009. The final report shall contain an assessment of all data collected under the monitoring program. The assessment shall include discussions of the fate and transport of constituents related to the construction of SR-125 and the impacts they may have on the Sweetwater River and Reservoir. The assessment shall also consist of a statistical analysis of the data. The report shall include data in tabular and graphical form, and electronic data shall be submitted to the Regional Board upon request.

<sup>3</sup> Caltrans and CTV may propose alternate constituents and frequencies if supporting rationale is provided.

- 4) **Data Quality Assurance.** If water quality data is obtained, sampling and analysis shall conform to a Quality Assurance Project Plan compatible with the Surface Water Ambient Monitoring Program (SWAMP).<sup>4</sup>
- 5) **Certification Statement.** Each monitoring and technical report submitted to the Regional Board shall include the following certification statement signed by either the principal executive officer, ranking elected official, or duly authorized representative of that person:

*I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person(s) directly responsible for gathering the information, the information is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*
- 6) **Alternative Form of Compliance.** Alternatively, Caltrans may meet the special condition in Resolution No. 2001-51 and the requirements of this order if they partner with the Sweetwater Authority and the United States Geological Survey in the aerial deposition study that is underway.<sup>5</sup>

## NOTIFICATIONS

1. Requirements established pursuant to Water Code Sections 13267(b) or 13383 are enforceable when signed by the Executive Officer of the Regional Board.
2. Pursuant to California Water Code section 13268, any person failing or refusing to furnish technical or monitoring program reports as required by Section 13267, or falsifying any information provided therein, is guilty of a misdemeanor, and may be liable civilly in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

---

<sup>4</sup> The State Water Resource Control Board (SWRCB) has prepared an electronic template for Quality Assurance Project Plans (QAPP) to assist in QAPP development, to provide a common format that will allow for review to be expedited, and to provide information on SWAMP consistency. Additional information and the template are available on-line at <http://www.waterboards.ca.gov/swamp/qapp.html>.

<sup>5</sup> The results of Phase I of the study is described in: Mendez, Gregory O., *et al.*, Water-and Air-Quality Monitoring of the Sweetwater Reservoir Watershed, San Diego County, California—Phase One Results, Continued, 1999-2001. Phase II of the study is underway.

Mr. Orso-Delgado

- 6 -

June 1, 2007

Mr. Hulsizer

INVESTIGATIVE ORDER NO. R9-2007-0092

3. Pursuant to Section 13385 of the Water Code, a violation of a requirements established pursuant to Water Code Section 13383 may subject you to civil liability of up to \$10,000 per day for each day in which the violation occurs.

  
\_\_\_\_\_  
JOHN H. ROBERTUS  
Executive Officer

1 June 2007  
Date



Linda S. Adams  
Secretary for  
Environmental Protection

# California Regional Water Quality Control Board

## San Diego Region

Over 50 Years Serving San Diego, Orange, and Riverside Counties  
Recipient of the 2004 Environmental Award for Outstanding Achievement from USEPA



Arnold Schwarzenegger  
Governor

9174 Sky Park Court, Suite 100, San Diego, California 92123-4353  
(858) 467-2952 • Fax (858) 571-6972  
[http:// www.waterboards.ca.gov/sandiego](http://www.waterboards.ca.gov/sandiego)

SEX  
RECEIVED

JUN 06 2007

June 1, 2007

### CERTIFIED MAIL

7007-0220-0000-4691-0503

In reply refer to:

**WPS: 18-1999133.02:ariac**

Mr. Pedro Orso-Delgado  
District Director  
Department of Transportation, District 11  
4050 Taylor Street  
San Diego, CA 92110

Mr. Greg Hulsizer  
Chief Executive Officer  
South Bay Expressway, LP  
California Transportation Ventures, Inc.  
880 Kuhn Drive  
Chula Vista, CA 91914

**SUBJECT: VIOLATION OF CLEAN WATER ACT §401 WATER QUALITY  
CERTIFICATION NO. 99C-133 FOR THE SOUTH BAY EXPRESSWAY (SR-125  
SOUTH).**

Dear Mr. Orso Delgado and Mr. Hulsizer:

On April 23, 2001, the San Diego Regional Water Quality Control Board (Regional Board) adopted Resolution No. 2001-51 approving Clean Water Act §401 Water Quality Certification for the State Route 125 South Toll Road Project (Resolution). This Certification was issued to the California Department of Transportation (Caltrans), and California Transportation Ventures (CTV), the applicants, provided that they would adhere to the stated conditions in the Resolution.

The Resolution requirements that were considered and adopted by the Regional Board were based on testimony provided during the public hearing on the matter. At the public hearing on April 23, 2001, Mr. Gary Gallegos, Caltrans District 11 Director, stated "We are committed to being a part of a regional study that would look [at] what the impacts of airborne pollutants would have on drinking water. And we think it would be a broad regional study that may be looked, the whole San Diego region, and we would commit to being a part of that."<sup>1</sup> The adopted Resolution included a special condition

<sup>1</sup> Audio tapes for Regional Board meeting, April 23, 2001. Tape 3, side B.

June 1, 2007

on page no. 2 that establishes that "Caltrans shall promote and pursue a regional air deposition study that will include the Sweetwater Reservoir Airshed."

In a letter dated November 5, 2001 to Mr. Charles Stoll, Deputy District Director for Caltrans District 11, I described the Regional Board's expectation that Caltrans comply with the special condition. This expectation included taking "an active, rather than a passive, role in the design and implementation of a study that would include actual measurements of the deposition of air pollutants in a region that includes the Sweetwater Reservoir Airshed."

In a report dated March 30, 2007, Caltrans reported that it has complied with the special condition, and describes their activities to date. Activities include developing a research proposal in 2005 with the assistance of the University of California, Davis, and the San Diego Association of Governments to address regional-scale cross-media impacts from on-road mobile source emissions. In February 2006, a Caltrans representative attended a workshop held by the California Air Resources Board and State Water Resources Control Board to discuss air pollutant deposition, storm water runoff, and impacts to water bodies.

The Regional Board does not consider the reported actions by Caltrans sufficient in themselves to constitute fulfillment of the special condition of the Resolution as clarified and defined in the Regional Board's letter dated November 5, 2001. Furthermore, Caltrans has been given ample opportunity to comply with this requirement via partnership with the Sweetwater Authority. In 1998, the Sweetwater Authority, in conjunction with the United States Geological Survey, initiated an air deposition study.<sup>2</sup>

One of the goals of this study was to compare chemical concentrations of samples from air, water, and bed sediment, and determine if any changes in reservoir water quality were the result of atmospheric deposition of organic chemicals and metals originating from the construction and operation of SR-125. The Sweetwater Authority has made repeated attempts and requests to Caltrans requesting assistance with this study.<sup>3</sup> Caltrans has provided no evidence that it has participated with the Sweetwater Authority on the study. For the reasons described above, the Regional Board finds Caltrans and CTV to be in violation of the special condition described in the Resolution (Notice of Violation No. R9-2007-0090).

The heading portion of this letter includes a Regional Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence please include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter.

---

<sup>2</sup> Mendez, Gregory O., *et al.*, Water-and Air-Quality Monitoring of the Sweetwater Reservoir Watershed, San Diego County, California—Phase One Results, Continued, 1999-2001.

<sup>3</sup> Letter dated January 9, 2007 to John Robertus, Regional Board Executive Officer, from Dennis Bostad, General Manager, Sweetwater Authority.

Mr. Orso-Delgado

- 3 -

June 1, 2007

Mr. Hulsizer

NOTICE OF VIOLATION NO. R9-2007-0090

Questions regarding this Notice should be directed to Ms. Christina Arias. She may be reached by phone at (858) 627-3931, or email at [carias@waterboards.ca.gov](mailto:carias@waterboards.ca.gov). Written correspondence pertaining to this Notice should be sent via email to Ms. Arias.

Respectfully,



JOHN H. ROBERTUS  
Executive Officer

JHR:mm:dg:ca

Enclosure

Notice of Violation No. R9-2007-0090

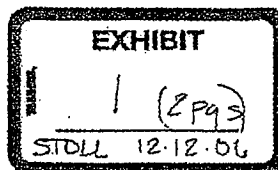
Court's Ex. 538  
Case # G10838118  
Rec'd \_\_\_\_\_  
Dept. 73 Clk. \_\_\_\_\_

STATE OF CALIFORNIA - BUSINESS, TRANSPORTATION AND HOUSING AGENCY

GRAY DAVIS

**DEPARTMENT OF TRANSPORTATION**  
DISTRICT 11

O. BOX 85406, M.S. 25  
SAN DIEGO, CA 92188-5406  
PHONE: (619) 688-6136  
FAX: (619) 688-3192



September 4, 2001

**RECEIVED**

Mr. John H. Robertus  
Executive Officer  
San Diego Regional Water Quality Control Board  
9771 Clairemont Mesa Boulevard, Suite A  
San Diego, CA 92124-1324

SEP 05 2001

SWEETWATER AUTHORITY  
ADMINISTRATION

Dear Mr. Robertus:

This correspondence is in reference to the Clean Water Act Section 401 Water Quality Certification dated April 24, 2001, issued by your office for the State Route 125 South project in San Diego County (File No. 99C-133). Specifically, it is to inform you of activities performed pursuant to the Special Condition listed on Page 2 of the Water Quality Certification which states, "Caltrans shall promote and pursue a regional air deposition study that will include the Sweetwater Reservoir Airshed."

In a recent letter we received from the Sweetwater Authority (SWA) on June 15, 2001, which was also copied to you, we were invited "into a partnership" involving the SWA's air quality monitoring program. It suggests that doing so would fulfill the Special Condition noted above. Although we do not believe the Special Condition requires our participation in SWA's air monitoring program, we want to make you aware of the substantial efforts we have participated in to date that do address the Special Condition.

The California Department of Transportation (Department) has a long history of addressing the issue of air pollutant deposition in the vicinity of the Sweetwater Reservoir. Beginning in 1997 when the SWA submitted its first of two reports assessing the impacts of SR 125 vehicle emissions on the Sweetwater Reservoir, we worked with air and water quality scientists from the University of California at Davis to review and comment on the reports. The University of California, Davis team participated along with Department staff in several meetings with SWA representatives and consultants. The team produced a report in July 1999, "Proposed State Route 125 South Air Emissions and the Sweetwater Reservoir," which concluded that the latest SWA report overestimated health risks and offered no compelling evidence to suggest that air pollution from SR 125 would pose a health hazard to Sweetwater Reservoir users. We concluded that if the issue was to be pursued further, it should be considered only on a regional basis and not at a project-specific level. A copy of the report and other supporting material was provided to your staff and Board during the consideration of the Section 401 Water Quality Certification for the SR 125 South project in December 2000.

Mr. John H. Robertus

September 4, 2001

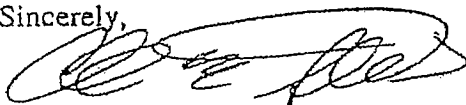
Page 2

Subsequent to the University of California, Davis report, the Department enlisted the support of the regional planning agency, the San Diego Association of Governments (SANDAG), to coordinate a series of meetings involving federal, state, and regional agencies with expertise in the fields of transportation, air quality, and water quality to assess the relationship of urban air quality to health risks from drinking water. A series of three meetings were convened on October 20, 1999, December 8, 1999, and January 20, 2000, at the SANDAG office in San Diego. Meeting participants included representatives from the San Diego Air Pollution Control District, the California Department of Health Services, the San Diego County Water Authority, the Metropolitan Water District of Southern California, the City of San Diego Water Department, the United States Geological Survey, and the Sweetwater Authority. In addition, Art Coe from your office attended the meeting on October 20, 1999. The meetings resulted in the establishment of a working group to decide if further study/research was warranted and, if so, to develop a plan or scope for the research. The working group determined that additional expertise in the areas of water quality and health risk assessment was needed and that several additional state agencies should be involved to properly assess this subject. As a result, a meeting hosted by the California Environmental Protection Agency was held on March 23, 2000, in Sacramento to consider the issue further. Attending was a select group of technical specialists representing the Office of Environmental Health Hazard Assessment, the California Air Resources Board, and the California Department of Health Services. Mr. James Bennett of the State Water Resources Control Board was also present. The meeting resulted in no further action.

We believe that the efforts of our Department, as described, fulfill the requirements of the Special Condition; and we do not intend to accept the invitation from the SWA to participate or fund their ongoing monitoring efforts at the Sweetwater Reservoir. It is our belief that the consensus of the agencies involved was that further study/research on this issue was not warranted. However, should that consensus change, we would remain a willing participant in any further efforts by an appropriate multi-disciplinary team of technical specialists to consider the issue of airborne pollutants on drinking water reservoirs, including the Sweetwater Reservoir, as long as the approach is regionally based, and not project specific.

Should you have further questions, please do not hesitate to contact me.

Sincerely,



CHARLES "MUGGS" STOLL

Deputy District Director

Environmental/SR 125 Tollway Project Manager

c: Mr. Al R. Sorenson, Sweetwater Authority  
Mr. Eric Pahlke, San Diego Association of Governments

## DEPARTMENT OF TRANSPORTATION

District 11  
2829 Juan Street  
P. O. BOX 85406, M.S. 25  
San Diego, CA 92110  
PHONE (619) 688-6668  
FAX (619) 688-3122  
TTY (619) 688-3214



*Flex your power!  
Be energy efficient!*

John H. Robertus, Executive Officer  
Attn: Kristin Schwall  
California Regional Water Quality Control Board  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123-4340

August 4, 2005

WPS:10-1014.02:schwkw

Dear Mr. Robertus:

The California Department of Transportation and California Transportation Ventures (CTV) are enclosing the Required Technical Report to respond to your July 8, 2005 correspondence regarding the State Route 125 South (Toll Road) 2004 Annual Report.

The report addresses the following as required:

1. Regional Air Deposition Study
2. Final Grading and Landscaping
3. Water Quality Monitoring

Please let me know if you have questions, I can be reached at (619) 688-3626.

Sincerely,

JESUS VARGAS  
NPDES Program Manager

SAN DIEGO REGIONAL  
WATER QUALITY  
CONTROL BOARD  
2005 AUG -4 P 12:56

cc: Pedro-Orso Delgado, District Director  
Dave Hawley, California Transportation Ventures  
Ellen Blake, USEPA  
John Welch, SWRCB  
Nancy Gilbert, Fish and Wildlife Service  
Bill Tippits, CA Department of Fish and Game  
Terry Dean, US Army Corps of Engineers  
Laurie Berman, Corridor Project Manager  
Ron Caraet, Senior Resident Engineer

Attachments

*"Caltrans improves mobility across California"*

DEPARTMENT OF TRANSPORTATION  
DISTRICT 11  
2829 JUAN STREET  
P. O. BOX 85406  
SAN DIEGO, CA 92186-5406  
PHONE (619) 688-6668  
FAX (619) 688-3122



Flex your power!  
Be energy efficient!

August 4, 2005

John H. Robertus, Executive Officer  
San Diego Regional Water Quality Control Board  
**Attn: Kristin Schwall**  
9174 Sky Park Court, Suite 100  
San Diego, California 92123-4340

Reference: State Route 125 South Project (WPS: 10-1013.02: schwk)

Subject: Response to RWQCB letter dated July 8, 2005

Dear Mr. Robertus,

California Transportation Ventures (CTV) and the California Department of Transportation (Caltrans) are providing this Required Technical Report in response to the Regional Water Quality Control Board's (RWQCB) letter dated July 8, 2005, pertaining to the 2004 Annual Report submitted in accordance with the Section 401 Water Quality Certification (401 Certification) for State Route 125 South (File No. 99C-133). This report addresses the concerns of the RWQCB in the order they are presented in the July 8, 2005 correspondence.

#### **Regional Air Deposition Study**

Caltrans and the San Diego Association of Governments (SANDAG) continue to promote and pursue a regional air deposition study. The scope of a regional study has been prepared and presented to the Transportation Research Board Air Quality Committee in June 2005. The proposed study is entitled *Evaluate Regional On-Road Mobile Source Air Emission Impacts on Drinking Water Reservoirs*. If the proposal is accepted, it will be conducted under the National Cooperative Highway Research Program (NCHRP).

The scope of the proposed study focuses on the assimilation, collection, and evaluation of specific research needed to document and understand the effects of mobile roadway air emission sources on reservoir drinking water quality and whether these sources pose an adverse health threat to consumers of reservoir-supplied drinking water. Once conceptually approved, the study would be designed to collect data and information for distinguishing the pollutant contributions from different contaminant sources (e.g., road traffic, recreational watercraft, or underground storage tanks).

The research study involves initial data collection, data analysis, and literature review to determine whether scientific evidence supports further investigation into the relationship between regional-scale mobile-source air emissions and the quality of reservoir-supplied drinking water. A major contributing piece to this discovery and evaluation phase will be the water quality monitoring program started by the U.S. Geological Survey in late 1998, which is

scheduled to continue for 3 years after the completion of SR 125 South construction. The USGS study is currently monitoring three sites on the Sweetwater Reservoir, one site at Loveland Reservoir, one site on the Sweetwater River, the imported water entering the Perdue treatment plant, and the treated water leaving the Perdue plant. Quarterly water samples are analyzed for volatile organic compounds (VOCs), polycyclic aromatic hydrocarbons (PAHs), and trace metals. Air monitoring is also being conducted near the Sweetwater Reservoir for VOCs (gas phase), PAHs (both gas and particle phases), and trace metals (particle phase) with guidance from the San Diego County Air Pollution Control District.

The results of the USGS study, and other similar and supporting literature and research, would be used to collectively develop conclusions, which would undergo peer review by a technical panel assembled by NCHRP to determine the need for further research and analysis. Pending consensus that further investigation is warranted, a second project phase would be developed to collect short or long-term air quality data at various monitoring locations, including the vicinity of Sweetwater Reservoir. Consistent with the supporting research evaluated in the first phase of the study, subsequent air and water quality sampling would be conducted at select sites to assist in correlating any adverse water quality impacts from regional air pollution, and quantifying the relative contribution from on-road mobile sources. In the event that adverse impacts are found, the research would be expanded into a third phase to investigate how these impacts would vary with time relative to changes in air emissions.

This research proposal was provided to the Transportation Research Board Air Quality Committee and will be forwarded to the NCHRP following initial review comments. As demonstrated by these developments and ongoing peer-review efforts, Caltrans and SANDAG have progressed beyond "the initial planning stages" and are pursuing viable and meaningful air/water quality research in compliance with the 401 Certification. The status of this development will be reported in the forthcoming 401 Certification Semiannual Update.

### **Final Grading and Landscaping**

In designing and constructing SR 125 South, engineers have strived to achieve a net balance of cut/fill to minimize the impacts of offsite hauling and possible disposal. However, to achieve this balance, various areas within the alignment cannot be landscaped until earthwork balancing is completed and irrigation is installed. To date, unplanted slopes that are completed have been temporarily stabilized and are scheduled for final landscaping installation once irrigation is available.

In order to minimize widespread earth disturbance, while efficiently coordinating the movement of cut/fill operations and expedite construction before the wet season, grading is currently limited to the following areas:

#### Gap/Connector

- Eastbound and westbound alignments of State Highway 54
- Sweetwater/Worthington Road alignment
- Entire Connector portion of the Gap/Connector, except for the area between approximately San Miguel Road and Proctor Valley Road

#### Toll Road

- Otay River Bridge slide remediation, abutments, and pier construction
- Birch Parkway interchange bridge construction and ramp
- Olympic Parkway to the Otay River Bridge
- Otay Lakes Road overcrossing bridge construction
- Eastlake Parkway detour
- Proctor Valley Road overcrossing bridges
- Between Proctor Valley Road bridges and SDG&E substation at San Miguel Creek

Section D.5 of the 401 Certification states that, "Landscaping of each segment between interchanges must be initiated prior to the start of grading or construction of the next phase of the project, unless the next phase of the project requires soil disturbance to balance earthwork." As summarized above, grading in various sections has been planned to avoid extended ground disturbance, and has been coordinated to balance cut and fill areas. Although significant volumes of earth are involved in the balancing of cut/fill on the project, Caltrans and CTV are committed to complying with permanent landscaping irrigation requirements (401 Certification Section D.6.) within 1 year of final grading.

Conceptual landscape plans have been submitted and reviewed. Final landscaping plans are anticipated by Fall 2005.

#### **Water Quality Monitoring**

The following sections address the three water quality monitoring issues cited in the RWQCB correspondence.

1. A discussion of what ambient suspended sediment concentration (SSC) and settleable solids (SS) were used for comparison with construction sampling events.

Ambient levels, upon which BMP discharge sampling for SSC and SS are triggered, are based on turbidity measurements upstream of the BMP. In a construction environment, upstream locations will vary depending upon changing field conditions and the BMP implemented to control runoff, erosion, and sedimentation. In areas where concentrated flow, overflow, or bypass from a construction BMP discharges to a receiving water, to the extent practicable and safe, the receiving water is traced upstream of the project alignment and a measurement taken to establish "ambient" conditions in that receiving water. In the absence of a discharge to receiving water, storm water run on from outside the project alignment upstream of a BMP (deemed appropriate for sampling) constitute ambient conditions. If upstream run on is not occurring, ambient conditions for a given BMP that is failing or breached, which discharges offsite outside the project alignment, are measured immediately upstream of the BMP before its treatment occurs.

*Per Section 4.1 of the State Route 125 South Construction Monitoring Plan (July 2003) submitted to the RWQCB, sampling for visible pollutants proceeds based on trigger level monitoring. Initially, this is based on a visual assessment (runoff color and clarity) of the sediment load in water emanating from the construction BMP. As the color and clarity of the*

*runoff reach a point of opacity that the observer deems above "ambient" color and clarity (as described above), turbidity measurements are taken to determine whether 20 percent difference between upstream (ambient) and downstream measurements exists that would trigger SSC and SS sampling.*

*For the SSC and SS sampling that occurred on December 28, 2004, (Sweetwater Basin and H Street Basin outflows), ambient levels were determined by taking measurements approximately 20 feet upstream of BMP.*

*Future construction BMP monitoring will be documented with maps showing the BMP being sampled, its proximity a receiving water (if present), ambient and downstream sampling locations, and location relative to the right of way. Photographs will also be taken for each sampling event to document field conditions at the time of sample collection.*

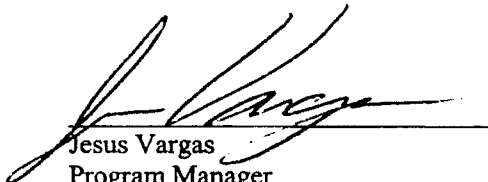
2. A discussion of follow-up activities, including additional sampling and improved BMP implementation, for the December 2004 sampling events that exceeded the turbidity trigger level of 2 percent over ambient (upstream).

*As discussed in the 2004 Annual Report for the 401 Certification, monitoring conducted at the Sweetwater Basin and H Street Basin on December 28, 2004, showed a difference in upstream, and downstream turbidity above 20 percent, which triggered follow-up activities. These activities included additional sampling on December 30, 2004, the recording of field observations (properly functioning BMP but evidence of sedimentation), and follow-up communication to construction personnel regarding the field conditions observed. Turbidity results of the December 30 sampling indicated a 26 percent and 13 percent differential at Sweetwater and H Street locations, respectively. Sampling for SSC was conducted, which showed a reduction of 90 percent and 42 percent respectively at the Sweetwater and H Street sampling points. BMPs were inspected during the follow-up sampling and were found to be functioning properly. However, additional gravel bags were added to the riser at the H Street Basin. Based on these follow-up observations, no other follow-up activities or BMP adjustments were deemed necessary.*

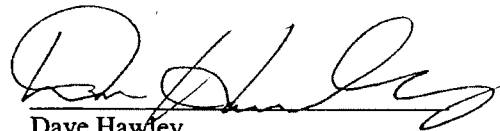
3. A discussion of why upstream samples were not collected for the fourth quarter receiving water samples and a confirmation of future upstream sample collection.

The two sets of upstream receiving water samples collected during 2004 were inadvertently viewed as establishing baseline water quality. The contractor determined that no further upstream sampling would be necessary unless elevated downstream concentrations were detected. This misinterpretation has been corrected, and upstream and downstream sampling will be conducted for future receiving water monitoring. Modification to the *Water Quality and Sediment Monitoring Plan* is not required.

*I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*



Jesus Vargas  
Program Manager  
NPDES/Storm Water Compliance  
Caltrans, District 11



Dave Hawley  
Vice President of Construction  
California Transportation Ventures



# California Regional Water Quality Control Board

## San Diego Region



Alan C. Lloyd, Ph.D.  
Secretary for  
Environmental  
Protection

Over 50 Years Serving San Diego, Orange, and Riverside Counties  
Recipient of the 2004 Environmental Award for Outstanding Achievement from USEPA

9174 Sky Park Court, Suite 100, San Diego, California 92123-4340  
(858) 467-2952 • Fax (858) 571-6972  
<http://www.waterboards.ca.gov/sandiego>

Arnold Schwarzenegger  
Governor

FEB 11 2005

ADMINISTRATOR:

FILE: CRWQCB 2805

February 8, 2005

Mr. Pedro Orso-Delgado, District Director  
California Department of Transportation (Caltrans)  
District 11  
P.O. Box 85406  
San Diego, CA 92186-5406

Mr. Nick James, President  
California Transportation Ventures, Inc.  
(CTV)  
880 Kuhn Drive  
Chula Vista, CA 91914

In reply refer to: WPS:10-1013.02:schwkw

**CERTIFIED MAIL NO. 7004 0750 0001 2969 2592 (RETURN RECEIPT)**

**State Route 125 South (Toll Road) October 2004 Semiannual Report Notice of Violation No. R9-2005-0070 and Required Technical Report**

Dear Mr. Orso-Delgado and Mr. James,

We have received the *Semiannual Update Section 401 Water Quality Certification Compliance, State Route 125 South, October 1, 2004 (October 2004 Update)*. Enclosed is Notice of Violation No. R9-2005-0070 for violations in the *October 2004 Update*.

Pursuant to California Water Code (CWC) section 13267 and 13383, the San Diego Regional Water Quality Control Board directs you to submit a **Required Technical Report (RTR)** received at the SDRWQCB no later than **5:00 PM, Friday, March 11, 2005**. A RTR is necessary due to serious and repeated violations of the requirements of Clean Water Act Section 401 Certification No. 99C-133. The RTR will be reviewed to assess the need for further possible enforcement actions. The RTR shall contain:

1. A discussion of how a regional air disposition study will be pursued as required by the Special Conditions of the Section 401 Certification.
2. Documentation of the alternatives considered and the necessity of a cross-culvert pipe at Proctor Valley Road instead of the required natural, soft bottomed crossing. The documentation should include a discussion of any hardscape material that is planned upstream and downstream of the culvert. As you know, the Section 401 Certification prohibits the use of hardscape material downstream to attenuate flows.
3. A discussion of the construction sampling which actually occurred in relation to the Section E.1 of the 401 Certification and the *State Route 125 South Construction BMP Sampling and Monitoring Plan, July 2003 (Construction Monitoring Plan)*. The upstream sample location of

**California Environmental Protection Agency**



the Worthington BMP should be clarified to determine if it is at the project boundary or just upstream of the BMP.

4. A discussion of the future construction monitoring which will occur including sample locations and BMPs to be monitored, storm selection criteria if different from the *Construction Monitoring Plan*, and constituents to be analyzed. If the *Construction Monitoring Plan* has been modified, submit a copy with the RTR.
5. A discussion of the possible causes for the 0% survival in the Otay River acute toxicity tests on May 25, 2004 for both upstream and downstream samples.

All reports submitted pursuant to this letter shall be signed by either a principal executive officer, executive director or a duly authorized representative of that person as described in Other Provision M.10 of Order No. 99-06-DWQ. Any person signing a report submitted pursuant to this letter shall make the following certification:

*I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*

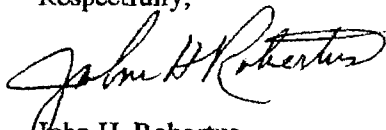
Failure to submit the above information by the date requested may result in the imposition of administrative civil liability pursuant to CWC sections 13268 and 13385.

The heading portion of this letter includes a Regional Board code number noted after "In Reply to." In order to assist us in the processing of your correspondence, please include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter.

Questions pertaining to the Required Technical Report and the enclosed Notice of Violation should be directed to Kristin K. Schwall at (858) 467-2345 or [kschwall@waterboards.ca.gov](mailto:kschwall@waterboards.ca.gov). Written correspondence should be directed to the following address:

John H. Robertus, Executive Officer  
Attn: Kristin Schwall WPS:10-1013.02:schwkw  
California Regional Water Quality Control Board, San Diego Region  
9174 Sky Park Court, Suite 100, San Diego, CA 92123-4340

Respectfully,



John H. Robertus  
Executive Officer

cc: Mr. Chi Vargas, Caltrans  
Mr. John Welch, SWRCB  
Ms. Ellen Blake, US EPA

Ms. Nancy Gilbert, Fish and Wildlife Service  
Mr. Bill Tippits, CA Department of Fish and Game  
Mr. Terry Dean, US Army Corps of Engineers





# California Regional Water Quality Control Board San Diego Region



Alan C. Lloyd, Ph.D.  
Secretary for  
Environmental  
Protection

Over 50 Years Serving San Diego, Orange, and Riverside Counties  
Recipient of the 2004 Environmental Award for Outstanding Achievement from USEPA

Arnold Schwarzenegger  
Governor

9174 Sky Park Court, Suite 100, San Diego, California 92123-4340  
(858) 467-2952 • Fax (858) 571-6972  
<http://www.waterboards.ca.gov/sandiego>

February 8, 2005

**IN THE MATTER OF:**

Mr. Pedro Orso-Delgado, District Director  
California Department of Transportation  
(Caltrans), District 11  
P.O. Box 85406  
San Diego, CA 92186-5406

Mr. Nick James, President  
California Transportation Ventures, Inc.  
880 Kuhn Drive  
Chula Vista, CA 91914

**NOTICE OF VIOLATION**

**NO. R9-2005-0070**

**WDID NO. 9 S11232304**

In reply refer to:  
WPS:10-1013.02:schwkw

**NPDES Permit No. CAS000003, SWRCB Order 99-06-DWQ**  
**Subject Site: State Route 125 South Toll Road**

**YOU ARE HEREBY NOTIFIED THAT:**

You are in violation of Clean Water Act Section 401 Water Quality Certification for State Route 125 South Toll Road, File No. 99C-133. Such violation subjects you to possible enforcement action by the California Regional Water Quality Control Board, San Diego Region, including administrative enforcement orders requiring you to cease and desist from violations, or to clean up waste and abate existing or threatened conditions of pollution or nuisance; administrative civil liability in amounts of up to \$15,000 per day per violation; referral to the State Attorney General for injunctive relief; and referral to the District Attorney for criminal prosecution.

The *Semiannual Update Section 401 Water Quality Certification Compliance, State Route 125 South, October 1, 2004 (October 2004 Update)* was submitted on September 29, 2004. The Regional Board reviewed the *October 2004 Update* and found the violations discussed below.

**Summary of Violations:**

**I. FAILURE TO PROMOTE AND PURSUE A REGIONAL AIR DEPOSITION STUDY**

**➤ Pursuant to Clean Water Act Section 401 Certification 99C-133, Special Conditions:**

- Caltrans shall promote and pursue a regional air deposition study that will include the Sweetwater Reservoir Airshed.

**Observation:** The *Annual Report, Section 401 Water Quality Certification Compliance, State Route 125 South (May 2004 Report)* received on May 13, 2004, stated that limited progress had been made with SANDAG regarding a regional air disposition study

**California Environmental Protection Agency**



including the Sweetwater Reservoir Airshed. The *October 2004 Update* states that Caltrans has contacted SANDAG to discuss the issue in recent months. Caltrans has not made significant progress in promoting and pursuing a regional air deposition study as required by the Special Condition of the Section 401 Certification.

## **II. FAILURE TO MAINTAIN THE NATURAL STREAMBED AT PROCTOR VALLEY ROAD**

- **Pursuant to Clean Water Act Section 401 Certification 99C-133, Project Design C.3:**
  - Bridges or culverts at Proctor Valley Road (Sta 147+00) shall be of sufficient width to provide velocities that will not require any hardscape downstream to attenuate flows. If culverts are used at these sites, the natural streambed within the culvert shall not be hardscaped. (Arch culverts may be used at these sites. Hardscape material may be placed immediately upstream of the culvert to prevent undercutting.)  
**Observation:** A cross-culvert pipe is currently planned at the surface water crossing near Proctor Valley Road in violation of Project Design C.3 of the Section 401 Certification.

## **III. FAILURE TO PLANT PERMANENT LANDSCAPE MATERIAL AND BEGIN IRRIGATION WITHIN ONE YEAR OF GROUND DISTURBANCES**

- **Pursuant to Clean Water Act Section 401 Certification 99C-133, Storm Water Compliance D. 6**
  - Caltrans and CTV shall plant permanent landscape material and begin irrigation within one year of ground disturbances.  
**Observation:** Landscaping and irrigation is planned for installation as segments are completed. In some segments, it will take more than a year from initial ground disturbance to final landscaping. The SR 54 connectors, Sweetwater River Bridge, and the Otay River Bridge are expected to take longer than a year to construct and install landscaping. A ground breaking ceremony was held on September 12, 2003. Shortly after this ceremony, chain and mowing, plant salvage, and grading began in large areas. These areas are not in final configuration and not landscaped.

## **IV. FAILURE TO CONDUCT STORM WATER MONITORING IN COMPLIANCE WITH 401 CERTIFICATION**

- **Pursuant to Clean Water Act Section 401 Certification 99C-133, Storm Water and Receiving Water Monitoring E.1:**
  - Caltrans and CTV shall implement a monitoring program that ensures removal effectiveness at five sites (located in Table 1 of the 401 Certification) and at five discharge locations downstream that are randomly selected. Monitoring shall occur during all storm events with rainfall totals of 0.25 inches at 75% probability, beginning when construction starts (for construction BMPs that are in use).  
**Observations:** Construction storm water BMP sampling was not conducted in accordance with Section E.1 of the 401 Certification or as detailed in the *State Route 125 South Construction BMP Sampling and Monitoring Plan, July 2003 (Construction Monitoring Plan)*.
    - a) Some storm water sampling was conducted for two storms in February, but two additional storms in February and two storms in April were over .25 inches and were not sampled.

February 8, 2005

- b) Only one BMP location was monitored.
- c) The storm water samples were analyzed for TSS, but not for turbidity, SSC, and SS as discussed in the *Construction Monitoring Plan*. Storm water samples were analyzed for the constituents listed in the Section 401 E.1.
- d) On Figure 1, the upstream sampling location for the Worthington BMP appears to be at the upstream project boundary. In order to provide an estimate of the effectiveness of the BMP, the upstream sample location should be just upstream of the BMP, but downstream of the construction.

**V. FAILURE TO CONDUCT RECEIVING WATER MONITORING IN COMPLIANCE WITH 401 CERTIFICATION**

➤ **Pursuant to Clean Water Act Section 401 Certification 99C-133, Storm Water and Receiving Water Monitoring E.1:**

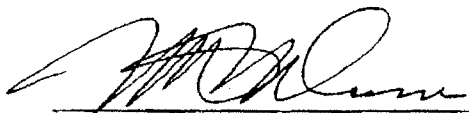
- Receiving waters located on the Otay and Sweetwater Rivers shall be sampled quarterly for water quality and annually for sediment quality. Monitoring shall begin when construction starts and continue for at least five years following construction completion. Receiving waters shall be monitored for the same constituents as the BMPs as well as acute toxicity, temperature, and dissolved oxygen.

**Observations:** The storm water samples collected in February 2004 at Sweetwater River and Otay River were not analyzed for acute toxicity, temperature, and dissolved oxygen as required for receiving water samples in Section E.1 of the 401 Certification. These samples appear to meet the requirements of receiving water samples except for the missing constituents. This failure to run the full analysis of the samples is a violation of the 401 certification.

The heading portion of this letter includes a Regional Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence, please include this code in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter.

Questions pertaining to the issuance of this Notice of Violation should be directed to Kristin K. Schwall at (858) 467-2345 or [kschwall@waterboards.ca.gov](mailto:kschwall@waterboards.ca.gov). Written correspondence pertaining to this Notice of Violation should be directed to the following address:

Michael P. McCann, Supervising Water Resource Control Engineer  
Attn: Kristin Schwall WPS:10-1013.02:schw  
California Regional Water Quality Control Board, San Diego Region  
9174 Sky Park Court, Suite 100, San Diego, CA 92123-4340



Michael P. McCann  
Supervising Water Resource Control Engineer

Feb. 8, 2005  
DATE

**California Environmental Protection Agency**



## DEPARTMENT OF TRANSPORTATION

District 11  
2829 Juan Street  
P.O. BOX 85406, M.S. 25  
Diego, CA 92110  
PHONE (619) 688-6668  
FAX (619) 688-3122  
TTY (619) 688-3214



*Flex your power!  
Be energy efficient!*

John H. Robertus, Executive Officer  
**Attn: Kristin Schwall**  
California Regional Water Quality Control Board  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123-4340

March 10, 2005

WPS:10-1014.02:schwk

Dear Mr. Robertus:

This letter is in response to the Notice of Violation (NOV) No.R9-2005-0070.

The California Department of Transportation and California Transportation Ventures (CTV) has enclosed the Required Response to the NOV. It addresses the following:

1. Air Deposition Study
2. Drainage Alternatives for Proctor Valley Road
3. Construction Monitoring/ Sampling
4. Receiving Water Sampling
5. Permanent Planting Scheme

Please let me know if you have questions, I can be reached at (619) 688-3626.

Sincerely,

A handwritten signature in black ink, appearing to read "Jesus Vargas".

JESUS VARGAS  
NPDES Program Manager

cc: Ellen Blake, USEPA  
John Welch, SWRCB  
Nancy Gilbert, Fish and Wildlife Service  
Bill Tippits, CA Department of Fish and Game  
Terry Dean, US Army Corps of Engineers  
Muggs Stoll, Deputy District Director Environmental, Caltrans  
Ron Caraet, Senior Resident Engineer  
Laurie Berman, SR125 Program Manager

Attachments

March 10, 2005

John H. Robertus, Executive Officer  
Attn: Kristin Schwall, WPS: 10-1013.02 schwk  
San Diego Regional Water Quality Control Board  
9174 Sky Park Court, Suite 100  
San Diego, California 92123-4340

**Reference: State Route 125 South Project (WPS: 10-1013.02: schwk)**

**Subject: Response to RWQCB Notice of Violation (No. R9-2005-0070), dated February 8, 2005**

Dear Mr. Robertus:

California Transportation Ventures (CTV) and the California Department of Transportation (Caltrans) are providing this Required Technical Report in response to the Regional Water Quality Control Board's (RWQCB) Notice of Violation (NOV) No. R9-2005-0070, dated February 8, 2005. The NOV pertains to the Semi-Annual Update, Section 401 Water Quality Certification (File No. 99C-133), State Route 125 South, dated October 1, 2004. This report addresses the following five issues, as required by the NOV submittal correspondence:

1. A discussion of how a regional air disposition study will be pursued

Caltrans has contacted Headquarters Air Quality Division and the San Diego Association of Governments (SANDAG) regarding the Regional Air Deposition Study. SANDAG, with Caltrans' assistance, has agreed to be the lead in pursuing the Regional Air Deposition Study. A request will be sent to all appropriate agencies to convene to determine the best way to proceed with this study. We would like to include the RWQCB in this meeting. Please provide a contact person from the RWQCB to participate in the meeting and any future issues regarding this study.

2. Documentation of alternatives considered and necessity of cross-culvert pipe at Proctor Valley Road instead of the required natural, soft-bottom crossing

The 401 Certification states that Proctor Valley Road or San Miguel Creek requires a natural, soft-bottom crossing. San Miguel Creek will remain a soft bottom crossing. Specifically, the culvert at the intersection of San Miguel Creek incorporates a natural, open-bottom design that will not add any hardscape to the natural geology of the streambed.

Conversely, Proctor Valley Road is a very steep, irregular, rocky channel that includes several small waterfalls that drain to a watercourse to the west. The crossing at Proctor Valley Road is just south of the bridge structure at Proctor Valley Road. The design flow for this crossing is 591 cubic feet per second (cfs) during the 100-year event and 240 cfs during the 10-year event. This crossing must satisfy two criteria in addition to the soft-bottom criteria. First, the

conveyance must be designed to pass the 100-year storm flows; second, the structure must be designed to withstand scour, erosion, and undermining resulting from these flows.

Several options were considered to meet these criteria, which included various configurations of concrete "portal frame" structures and concrete arch structures with natural bottoms. The proposed conditions result in a culvert design with unusually high slope ( $S=8.17\%$ ) and very high flow velocities. A portal frame design or concrete arch structure with natural bottom would incur substantial scour and erosion even during small storm events. The scour resulting from the 100-year storm would undermine the drainage structure and could cause potentially catastrophic damage to the road embankment.

Three alternatives were analyzed to flatten the slope and reduce velocities. One option considered involved grading and redefining the upstream area. This option is not recommended because the limits needed to regrade extend beyond the project right-of-way for approximately 14 meters (46 feet). This area would impact approximately 1.5 acres, including environmental resources, and would result in additional right-of-way.

A second option considered was a concrete drop structure that would lower the inlet to an appropriate elevation to reduce flow velocity. The drop of this structure would be approximately 14 meters (46 feet). This would be a nonstandard box and very irregular, resulting in a fall hazard for the public and wildlife. Riprap would also be required at the bottom of the drop structure. Maintenance of the drop structure and channel would occur under unsafe conditions because access would be limited to one side.

A third option considered involved construction of a bridge. The channel thalweg is approximately 28 meters (92 feet) below State Route (SR) 125 South profile grade. If a bridge were used to span the culvert, a 2:1 slope would be required for stability. Therefore, the abutment would be approximately 60 meters (197 feet) from the edge of culvert. If bridges are constructed over Proctor Valley Road, then the bridges over the road and channel would meet, resulting in a pair of 220-meter (722 feet)-long six-span bridges. In addition to excessive cost, bridges of this size are not reasonable because of the following:

- Additional environmental impacts would occur.
- A significant visual impact to the surrounding area would occur.
- Soils in the area are not suitable for bridge foundations. Extensive remedial work or very deep foundations would be required.

To minimize the risk of flood hazard to the structures, the channel invert must be lined. The most practical alternative is a reinforced concrete pipe or reinforced concrete box culvert. Erosion control best management practices (BMPs) (e.g., rock slope protection with geotextile

fabric) will be installed to prevent scour from developing at both the upstream and downstream ends of the culvert. Such BMPs are required to reduce the flow velocity to the pre-project condition, which is a requirement of the 401 Certification.

The project design team considered soft-bottom streambeds at both San Miguel Creek and Proctor Valley. However, because a soft-bottom alternative is not feasible due to the factors summarized above, a lined alternative for Proctor Valley was necessary. Since the San Miguel crossing will remain a natural, soft-bottom drainage, Condition C.3, as stated in the 401 Certification, has been met.

3. A discussion of the construction sampling that actually occurred in relation to the Section E.1 of the 401 Certification and *Construction Monitoring Plan*

The *Construction Monitoring Plan* (July 2003) was developed to address monitoring and sampling requirements for visible pollutants (turbidity, suspended sediment concentration, and settleable solids). Caltrans and CTV recognize that a full constituent analysis of February 2004 storm water samples was not conducted. Caltrans and CTV, through oversight of the Contractor, are committed to avoiding this situation in the future. Construction storm water sampling during the fall/winter 2004 wet season has been analyzed for the required constituents.

Receiving-water sediments were sampled after the 2003-2004 wet season (second calendar quarter). Conducting sediment sampling after the seasonal runoff provides an appropriate opportunity to characterize annual sediment deposition and chemistry. For this reason, this initial sampling benchmark (May/June) will be repeated for future receiving water sampling.

According to the National Oceanic and Atmospheric Administration (NOAA) website for the Chula Vista area ([http://newweb.wrh.noaa.gov/sgx/obs/rtp/rtp\\_CHV\\_04](http://newweb.wrh.noaa.gov/sgx/obs/rtp/rtp_CHV_04)), there were four storms in February 2004 and no storms in April 2004 that produced greater than 0.25 inch of rain fall. The four storms in February occurred on the 3<sup>rd</sup>, 19<sup>th</sup>, 22<sup>nd</sup> through 23<sup>rd</sup>, and 26<sup>th</sup> through 28<sup>th</sup>. Sampling is normally conducted within 1 hour of runoff to provide a more representative sample by measuring runoff before constituents can be washed away. For safety reasons, sampling is not conducted before or after daylight. Storm events sampled met the deployment criteria (probability, amount, and/or antecedent dry period). In addition, sampling is dependent on construction BMP performance. As such, BMPs are sampled when they are deemed ineffective.

The February 3 and 19 storms were sampled because the sampling criteria were met. The other two storm events were not sampled because they were not separated by 72 hours of dry weather. Sampling for the February 3 and 19 storms took place downstream of Worthington at the project right-of-way (location 4 on the attached map) and at a BMP located at Station 196 (location 1, 2, and 3 on the attached map). Location 1 represents run off downstream of the BMP at the right-

of-way; location 2 represents discharge immediately downstream of the BMP; and location 3 represents run on upstream of the BMP at the right-of-way.

The purpose of sampling at Worthington was to characterize the background water quality before it entered the construction site.

Sampling at the BMP located at Station 196 because it was found to be the only location meeting the applicable criteria. At this time (February 2004), little or no ground disturbance had occurred elsewhere within the project area. For this sampling event, both an upstream sample and a downstream sample were collected.

In addition, a natural groundwater spring was sampled (March 24, 2004) to characterize background water quality before significant construction in the watershed began. There was no BMP associated with this sample. This sampling was conducted to provide additional information about run-on characteristics and ambient water quality in the area.

#### 4. A discussion of future construction monitoring

Following June 2004, construction BMPs have been monitoring and sampled per the criteria contained in the *Construction Monitoring Plan (July 2003)* and the 401 Certification. Specifically, construction BMPs are selected for sampling based on active construction areas, BMP integrity, and runoff characteristics. Because construction activities and associated compliance monitoring are dynamic, BMPs selected for sampling are expected to change with time, and possibly between storm events.

In addition to having rainfall commence during daylight hours per the NPDES General Storm Water Permit for Storm Water Discharges Associated with Construction Activities (Order 99-08-DWQ), deployment for construction sampling is based on the following 401 Certification criteria:

- 75% probability of rainfall occurrence
- 0.25 inch or greater of predicted rainfall
- storms separated by a minimum of 72 hours of dry weather

As viable storms occur that meet the sampling criteria above, the following is used to determine the suitability for construction BMP sampling:

- Visually assess to determine if discharge is above ambient color.
- Perform field screening of runoff turbidity; if >20% of ambient, then collect lab samples (during first 2 hours).

- Revisit BMP and collect post-storm samples within 24 hours of storm if there is turbidity >10% between upstream and downstream turbidity levels.
- If conditions for sampling are too hazardous, deploy field crews as soon as conditions are safe.

In some cases, storm water quality sampling for construction may occur at select permanent (post-construction) BMP locations to monitor effluent discharges when these BMPs are used during the construction phase (e.g., as siltation basins or sediment traps). To date, these permanent BMPs have not been constructed.<sup>1</sup> However, grab sampling (as required by construction storm water regulations) does not provide sufficient data to determine BMP pollutant removal efficiencies. Rather, assessing BMP pollutant removal efficiencies is planned when post-construction BMPs are completed and equipped for composite sampling, and their respective roadway drainage areas are in operation. Grab sampling associated with construction BMP implementation indicates whether the BMP is effective, but cannot be used to assess pollutant removal efficiency.

5. A discussion of the possible causes for the 0% survival in the Otay River acute toxicity tests on May 25, 2004, for both upstream and downstream

Samples from the Otay River were collected on May 25, 2004, to test for acute toxicity and 0% was the reported survival. MEC-Weston's Toxicology Laboratory reported that the 0% survival might be due to the high salinity measurements recorded in the Otay River water samples. The salinity values for the Otay River samples were 4.0 parts per thousand (ppt) and Sweetwater River samples were 2.0 and 2.5 ppt. Historical laboratory reference toxicant tests performed on *C. dubia* indicate that the No Observed Effect Concentration (NOEC) for salinity is 1.0 ppt and the Lowest Observed Effect Concentration (LOEC) is 2.0 ppt. Data suggest that the toxicity observed in the Otay River samples may be attributed to the salinity in the receiving waters. The salinity measure in the Sweetwater River samples had the potential to create a salinity-induced response based on historical data; however, no toxicity was observed.

Future testing for acute toxicity on the receiving water samples using the alternative test organism *Pimephales promelas* (a freshwater fish also known as Fathead Minnow) will occur. This is a widely used species in toxicity testing and is another recommended organism in the same method guidance as *C. dubia*. The advantage of utilizing *P. promelas* is that it is known to be slightly more tolerant of salinity than *C. dubia*. Historical laboratory data indicate that *P. promelas* can tolerate up to 5.0 ppt salinity in certain water types without an observed negative effect. Subsequent monitoring, using test organism *P. promelas* indicated a 96.25% survival upstream and a 92.5% survival downstream within the Otay River.

---

<sup>1</sup> Table 1 of the 401 Certification, and referenced in the Notice of Violation Section IV, is associated with post-construction BMP locations, not temporary construction BMPs.

In addition to addressing each of the issues stated in the RWQCB's cover correspondence, Caltrans and CTV offer the following discussion relative to NOV Item III.

Landscaping design is currently in progress and is expected to be completed in the fall of 2005. The planting of landscape vegetation relies on finished grade, the installation of water supply outlets, irrigation networks, controllers, and other associated infrastructure. Installation of cross drainage facilities handling offsite drainage is incorporated into grading plans, and permanent BMPs will be constructed as early in the construction schedule as practical.

Although landscaping has not occurred within 1 year of ground disturbance, its immediate installation is planned once final grading is completed and utilities (e.g., power, fiber optics, etc.) are installed. In certain segments, it may take more than 1 year from initial ground disturbance to initiate landscaping because the construction for some project features (such as the SR 54 connectors, Sweetwater River Bridge, and the Otay River Bridge) requires multiple years. However, disturbed soils are, and will be, stabilized if vegetative planting and irrigation are not practical during intermediate construction phases.

During grading operations, appropriate soil stabilization controls will be deployed, and exposed slopes will be covered with appropriate BMPs during slope construction. Topsoil placement will occur as slopes are finished and contour grading is completed. Installation of irrigation systems and subsequent landscaping will follow.

Grading to date has been performed in accordance with Section D.5 of the 401 Certification. In addition, the chain and mow method of clearing vegetation has been employed to minimize ground disturbance. Grading activities to date have been limited to:

- a) Remedial grading and embankment construction to support bridge construction at Mount Miguel Ranch Road
- b) Remedial grading and embankment construction to support bridge construction at H Street
- c) Grading required for drainage development to facilitate bridge construction at Otay Lakes Road
- d) Remedial grading and embankment construction to support Olympic Interchange bridge construction
- e) Excavation for embankment operations in the Olympic interchange to facilitate the set-up of project field office facilities within the project right-of-way immediately south of Olympic Parkway
- f) Remedial grading and embankment construction to support bridge construction and ramp grading at Birch Road interchange

- g) Grading as required for abutment and pier construction and truss erection/segment storage for the Otay River Bridge
- h) Access and egress needed for geotechnical investigations, access road construction, haul road construction, and the stockpiling of aggregates

In addition, grading work has been performed within the project limits on Birch Road and in the area of Bob Pletcher Parkway by the adjacent developer. This work is being performed per executed encroachment permits. The responsibility for installing and maintaining BMPs in these areas is the developer's, until such time as these work areas are turned over to Caltrans and CTV for subsequent construction activities.

After completion of bridge construction, material balancing will occur between Olympic Parkway and Proctor Valley Road. Earthwork balancing on the northern portion of the project will occur from Proctor Valley Road and San Miguel Creek.

Consistent with Condition D.6 of the 401 Certification, landscaping and irrigation will be installed and operational prior to opening day of the roadway between Olympic Parkway and SR 54.

It is Caltrans' and CTV's understanding that the intent of the condition requiring landscaping within one year is to avoid and minimize water quality impacts resulting from exposed slopes and to require landscaping, including irrigation, installation when finished grade and utilities are in place. While the project, due to the realities of a multi-year, design-build, linear construction project, is faced with an unreasonable and infeasible condition of landscaping within a year of ground disturbance, the project is fully committed and prepared to install and maintain erosion and sediment controls to avoid and minimize adverse impacts to water quality during construction. In addition, the project is equally committed to phasing the construction so that irrigation and plant installation occurs immediately following finish grade and availability of utilities.


Caltrans and CTV are dedicated to meeting the conditions identified in the 401 Certification. We look forward to continuing to coordinate with RWQCB staff to monitor and verify compliance with the regulatory requirements of this important regional project.

Response to NOV R9-2005-0070

March 10, 2005

Page 8

*I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*



---

Jesus (Chi) Vargas  
Program Manager  
NPDES/Storm Water Compliance  
Caltrans, District 11



---

Greg Hulsizer  
CEO  
SAN DIEGO EXPRESSWAY, L.P.  
By California Transportation Ventures, Inc.,  
its general partner

## NOTICE OF VIOLATION MEETING SR 125 SOUTH

DATE OF MEETING: March 10, 2005

### Participants:

Name	Initials	Attended	Organization	Phone Number
Bruce April	BA	Y	Caltrans	858-616-6614
Jacqueline L. Dompe	JLD	Y	EDAW	619-233-1454
Mark Williams	MW	Y	EDAW	619-233-1454
Kristin Schwall	KS	Y	RWQCB	858-467-2345
Stacey Baczkowski	SB	Y*	RWQCB	858-637-5594

\* Late arrival; sat in on last 15 minutes of the approximate 1 hour meeting.

This meeting was held at the offices of the San Diego Regional Water Quality Control Board (RWQCB) to deliver and discuss responses to the RWQCB Notice of Violation (R9-2005-0070). A Required Technical Report (RTR) from Caltrans and CTV was provided to the RWQCB, which formed the basis of discussion for this meeting. KS inquired about the format of the RTR and acknowledged that RWQCB staff's primary concerns were included in the cover letter that transmitted the NOV. JLD explained that this was consistent with the format of the RTR; however, items listed in the NOV that were not included in the RWQCB's cover letter (e.g., landscaping) were also discussed in the RTR.

### Action Item

### Issue

#### **Regional Air Deposition Study**

Caltrans has contacted Headquarters Air Quality Division and the San Diego Association of Governments (SANDAG) regarding the Regional Air Deposition Study. SANDAG, with Caltrans' assistance, has agreed to be the lead in pursuing the Regional Air Deposition Study. BA reiterated that this issue was on Muggs Stoll's (the Deputy Director's) action list. A letter will be sent to all appropriate agencies to convene to determine the best way to proceed with this study. KS identified herself as the RWQCB's point of contact for this issue.

#### **Soft-bottom Culvert Crossings at Proctor Valley Road/San Miguel Creek**

**3/10/05 Update:** BA referred to the 401 Certification condition that required a natural, soft-bottom crossing is required at Proctor Valley Road or San Miguel Creek, and that this Condition requires a soft bottom design at one location or the other. JLD explained that the project designers considered soft-bottom crossings at both locations but the engineering and environmental constraints at the Proctor Valley crossing precluded a soft bottom design.

JLD explained that the Proctor Valley Road crossing is a very steep, irregular, rocky channel that must be designed to pass the 100-year storm flows and withstand scour, erosion, and undermining resulting from these flows. It was explained to the RWQCB that three options were considered to meet these criteria (grading and redefining the upstream area, a concrete drop structure that would lower the inlet to an appropriate elevation to reduce flow velocity, or construction of a bridge). The evaluation of these alternatives revealed that significant environmental impacts and impractical engineering requirements required by a soft bottom

**Action  
Item****Issue**

alternative would be inappropriate. The best practical solution is either a reinforced concrete pipe or reinforced concrete box culvert.

In closing the discussion on this topic, it was again confirmed that the project design team considered soft-bottom streambeds at both San Miguel Creek and Proctor Valley. Since the San Miguel crossing will remain a natural, soft-bottom drainage, and the engineering characteristics of the Proctor Valley Road crossing are not adequate to safely design a soft-bottom profile water crossing, Condition C.3 of the 401 Certification is considered to be satisfied.

**Construction-Related Sampling**

MW acknowledged that there were some inconsistencies in construction-related storm water sampling during the early months of construction and that the project team has established protocols and hired consultants to assist in this important compliance effort. Construction storm water sampling during the fall/winter 2004 wet season has been analyzed for the required constituents.

Further, it was explained that it appeared RWQCB staff were referencing Lindbergh Field precipitation records for viable storm water sampling events, while the project team reviews local forecasts for the Chula Vista, La Mesa, Bonita, and Lake Murray areas because they represent rainfall in the project area. The difference between coastal, bay front precipitation and inland rainfall patterns 20 miles away were discussed and clarified. The RWQCB recognized the appropriateness of using local rainfall forecasts for monitoring and sampling deployment decisions, and acknowledged the project team's decisions for sampling in February and April of 2004.

The criteria for monitoring of construction BMPs was clarified to the RWQCB, which is based on the *Construction Monitoring Plan* (July 2003) and the 401 Certification. When the storm event/sampling criteria of these project documents are met, sampling is conducted. It was clarified to the RWQCB that several storms during 2004 began during the night and the requirement for sampling within 1 hour of runoff is not possible due to safety reasons, and that sampling during daylight hours is a requirement of the governing construction storm water regulations. Further, it was explained to the RWQCB that if sampling were to occur several hours after rainfall had started (i.e., at first light), the chemistry of the samples collected would be compromised (constituents would already be washed away). However, the RWQCB was reminded that construction BMP inspections have occurred before, during, and after viable storms, and that the integrity of the BMPs is one of the main criteria that drives the need for sampling (e.g., when there is a breach or failure of a BMP).

The RWQCB's question over the sampling at Worthington was explained to be for the purpose of characterizing background water quality before it entered the project's construction area, and that BMP sampling near Station 196 occurred because it was the only location meeting the applicable criteria. It was further clarified to the RWQCB that the sampling of a natural groundwater spring was conducted (March 24, 2004) to characterize background water quality before significant construction in the watershed began as to provide additional information about run-on characteristics and ambient water quality in the area.

**Future Construction Monitoring**

**Action  
Item****Issue**

JLD clarified to the RWQCB staff that future construction BMP monitoring, as well as that which has followed since June 2004, will be in accordance the criteria contained in the *Construction Monitoring Plan* (July 2003) and the 401 Certification. Specifically, construction BMPs will be selected for sampling based on active construction areas, BMP integrity, and runoff characteristics. The RWQCB was reminded that the BMP monitoring and sampling locations will change over time because of the dynamics associated with construction activities, and that for this reason, BMP sampling will likely change between storm events. JLD mentioned that the Annual Report (due to the RWQCB on April 1) will document compliance with these conditions.

MW explained the deployment criteria for sampling during daylight hours to the RWQCB per the 401 Certification criteria, which are:

- 75% probability of rainfall occurrence
- 0.25 inch or greater of predicted rainfall
- storms separated by a minimum of 72 hours of dry weather

JLD pointed out that in some cases, storm water quality sampling for construction may occur at select permanent (post-construction) BMP locations to monitor effluent discharges from these BMPs if they are used during the construction phase (e.g., as siltation basins or sediment traps). However, these permanent BMP locations have not been constructed to date and do not currently apply. JLD stated that Table 1 of the 401 refers to permanent BMP locations not temporary construction BMPs.

**Toxicity Testing**

MW explained that the zero percent survival of toxicity test species for the May 25, 2004 Otay River sample was likely due to the high salinity of the river water samples. The salinity values for the Otay River samples were 4.0 parts per thousand (ppt), which is twice as high as the species (*C. dubia*) can tolerate (2.0 ppt). Therefore, the toxicity was caused by ambient conditions in the Otay River samples. BA explained that this is not surprising given the type of vegetation that exists within the Otay River watershed. Development of the revegetation plan has presented some challenges regarding appropriate plant species to be used for this effort. BA mentioned that CDFG had concerns about the original revegetation plan submitted, but that the revised plan is considerably better.

The RWQCB was informed that testing for acute toxicity on the receiving water samples since the May/June receiving water sampling will use an alternative test organism *Pimephales promelas* (fathead minnow) because this species is widely used in toxicity testing and is another recommended organism in the same method guidance as *C. dubia*. Using *P. promelas* is applicable because it is can tolerate up to 5.0 ppt salinity in certain water types without an observed negative effect.

**Landscaping**

JLD stated that although the intent of the condition requiring landscaping within one year is to avoid and minimize water quality impacts from exposed slopes, the realities of a multi-year, design-build construction project make this requirement impossible to meet. JLD reaffirmed the project's commitment to install and maintain erosion and sediment controls to avoid and

**Action  
Item**

**Issue**

minimize adverse impacts to water quality during construction and to phasing the construction so irrigation and plant installation can occur immediately following finish grade and availability of utilities (e.g., water supply outlets, irrigation networks, controllers, and other associated infrastructure).

BA explained that landscaping design has resulted in ongoing coordination among the parties and that it is progressing, albeit not as smoothly as Caltrans and CTV had hoped. BA and JLD acknowledged that receiving a NOV regarding this issue has increased the Contractor's awareness of the importance of this issue. Final landscape design is expected to in the fall of 2005.

JLD acknowledged that contrary to typical Caltrans' projects, where landscaping is a separate contract from roadway construction, the SR 125 S design/build contract includes landscaping.

SB acknowledged that a change to a permit condition would require Board action that would reopen potential challenges to the project. SB questioned whether or not Caltrans and CTV commented on the infeasibility of the condition during the hearing for the 401. BA did not know, but would check his notes. BA acknowledged that the EIR/S states that landscaping shall be implemented within 1 year of grading in developed areas unless otherwise required for biological mitigation.

SB stated that the RWQCB Director would consider in the information contained in the RTR when assessing the need for further action. It was suggested that a schedule for landscaping and the landscape plans be provided to the RWQCB staff to demonstrate a commitment to landscape at time of finished grade.

- ❑ ORC to prepare and submit a schedule indicating the anticipated timing of final slope grading, the application of erosion control products, the completion of irrigation and utility installation, and the installation of landscaping. Current landscape design to be submitted.

**Misc. Items**

BA provided an update of the Vernal Pool and Quino Checkerspot Butterfly Restoration Project, including photographs of a recent site tour by the native grassland association; Scott McMillan's role as lead restoration ecologist; positive effects of the rain. SB acknowledged that it was good to hear that part of the project was progressing well.

The meeting adjourned at approximately 4:10 p.m.



## SWEETWATER AUTHORITY

505 GARRETT AVENUE  
POST OFFICE BOX 2328  
CHULA VISTA, CALIFORNIA 91912-2328  
(619) 420-1413  
FAX (619) 425-7469  
<http://www.sweetwater.org>

GOVERNING BOARD  
R. MITCHEL BEAUCHAMP, CHAIR  
JAMES C. ALKIRE, VICE CHAIR  
JAMES "JIM" DOUD  
RON MORRISON  
W.D. "BUD" POCKLINGTON  
TERRY THOMAS  
MARGARET COOK WELSH

January 9, 2007

Mr. John H. Robertus  
Executive Officer  
San Diego Regional Water Quality Control Board  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123-4340

DENNIS A. BOSTAD  
GENERAL MANAGER  
MARK N. ROGERS  
OPERATIONS MANAGER

Court's Ex.	535
Case #	910838118
Rec'd	
Dept.	73 Clk

Dear Mr. Robertus:

Subject: STATE ROUTE 125 – 401 WATER QUALITY CERTIFICATION  
SWA FILE: ROUTE 125 – GENERAL

This letter is sent to you regarding compliance by the California Department of Transportation (Caltrans) and California Transportation Ventures (CTV) with their 401 Water Quality Certification. As you are aware, the construction of State Route 125 (SR 125) is progressing, with completion expected within one year. You are also aware that a portion of this roadway is in close proximity to the Sweetwater Reservoir. Sweetwater Authority (Sweetwater) has historically been, and continues to be, concerned with a potentially significant increase in the ambient airborne particulates from all vehicles that use this roadway and traverse the Sweetwater Reservoir property. This, in turn, could create the need for installing advanced water treatment facilities at Sweetwater's Robert A. Perdue Water Treatment Plant. Sweetwater is also cognizant of increasing stringent regulations by the U.S. Environmental Protection Agency regarding air and water contamination.

Caltrans and CTV were issued a 401 Water Quality Certification by the Regional Water Quality Control Board dated April 24, 2001, File No. 99C-133, for this project. On page 2, Special Conditions, the last paragraph requires Caltrans and CTV to promote and pursue a regional air deposition study that includes the Sweetwater Reservoir airshed. It is our understanding that Caltrans submitted a letter dated September 4, 2001 to your attention, stating it had complied with this condition. However, a letter dated November 5, 2001, under your signature, was sent to Caltrans noting that the information provided in its letter did not fulfill this condition. Your letter was quite emphatic:

"I call your attention to the highlighted words in the preceding paragraph. To comply with the Special Condition cited above, I would expect Caltrans to take an active, rather than a passive role in the design and implementation of a study that would include

RECEIVED
JAN 10 2007
BY: _____

*A Public Water Agency  
Serving National City, Chula Vista and Surrounding Areas*

Mr. John H. Robertus  
Re: State Route 125 – 401 Water Quality Certification  
January 9, 2007  
Page 2 of 4

actual measurements of the deposition of air pollutants in a region that includes the Sweetwater Reservoir Airshed."

Your statement that Caltrans "...would remain a willing participant in any further efforts by an appropriate multi-disciplinary team of technical specialists to consider the issue of airborne pollutants on drinking water reservoirs ..." does not reflect an active role in pursuing studies on the part of Caltrans.

Subsequently, Sweetwater has learned that the next purported detailed correspondence on the air deposition study was an Annual Report dated April 1, 2006 (some five years later), as submitted by EDAW, Inc. This report provided information related to all of the conditions in the 99C-133 certification for a period between January 1 and December 31, 2005. Specific to the regional air deposition study requirement, the report notes on pages 2 and 3 that a research proposal was developed by the University of California Davis, and subsequently submitted to various regulatory agencies for funding. This includes the California Air Resources Board and the State Water Resources Control Board. It is our understanding that no funding has been received, including that by Caltrans itself, therefore, no studies have been conducted. At no time was Sweetwater notified, consulted, contacted, or written to on this matter.

At this time, it may be beneficial to understand that Sweetwater has proceeded to conduct an air deposition study for Sweetwater Reservoir. This study, which commenced in 1999, is being performed by the United States Geological Survey. Sweetwater has repeatedly made attempts with Caltrans to partner in this study. The USGS study is intended to measure air quality before, during, and after construction and operation of this roadway. In its simplest form, this study intends to measure the difference in air quality before and after operations, and to determine the significance of this difference. Sweetwater has made repeated attempts and requests to Caltrans asking for its assistance both scientifically and economically in this study. These requests occurred well before the issuance of the 99C-133 certification. Enclosed are copies of all correspondence sent indicating these offers.

It is our belief that Caltrans and CTV will not pursue a study, as they do not believe there are any impacts, and will only proceed (if at all) if funding is provided by others. Mr. Charles (Muggs) Stoll at a recent deposition by Sweetwater's Legal Counsel, Mr. Don Detisch, provided these responses to the questions asked:

Mr. John H. Robertus  
Re: State Route 125 – 401 Water Quality Certification  
January 9, 2007  
Page 3 of 4

Q. "Exhibit 3-184, it says, 'Muggs said that since we do not impact the reservoir, we cannot justify monitoring it.' Was that your opinion at that time, sir?"

A. "Yes."

Q. "This was based on scientific studies that you conducted?"

A. "No."

Q. "Do you know how to conduct an air study?"

A. "No."

Q. "Caltrans would have nothing with which to tie the cost of monitoring. It could not justify the expenditure of public funds. Was that your opinion?"

A. "Yes."

Q. "Okay, is that still your opinion today, sir?"

A. "It's still my opinion today."

Stoll Deposition – December 12, 2006,  
p. 105, line 25; p. 106, lines 1-91

Sweetwater believes that Caltrans has not complied with the 401 requirements, and only recently has presented you with a report because Sweetwater raised its failure to comply with the Board's special condition in the eminent domain proceeding by and between Sweetwater and Caltrans.

Importantly, if negative impacts are directly shown, then Sweetwater would expect financial contributions towards the appropriate mitigation, such as advanced water treatment facilities, necessary to return Sweetwater's water quality to its "before construction status."

In conclusion, Sweetwater requests that you provide us with your written response, indicating whether Caltrans and CTV have complied with the conditions of providing a regional air deposition study that includes the Sweetwater Reservoir airshed. If there is other correspondence between your

Mr. John H. Robertus  
Re: State Route 125 - 401 Water Quality Certification  
January 9, 2007  
Page 4 of 4

office and Caltrans/CTV on this matter that Sweetwater may not be aware of, then we would appreciate a copy.

Thank you for assisting us in this matter. You may contact me at (619) 409-6701, or Mr. Jim Smyth, Director of Engineering, at (619) 409-6750 if you have any questions.

Sincerely,

  
Dennis Bostad  
General Manager

DB:JLS:ss

enclosures: as cited

cc: Mr. Jim Smyth, Sweetwater Authority  
Mr. Don Thomson, Sweetwater Authority  
Mr. Rick Alexander, Sweetwater Authority  
Don Detisch, Esquire, Law Offices of Don Detisch

1 NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP  
JOHN J. FLYNN III (SBN 76419)  
2 CAROLLYN B. LOBELL (SBN 209933)  
ROBERT C. HORTON (SBN 235187)  
3 18101 Von Karman Avenue, Suite 1800  
Irvine, California 92612-0177  
4 Telephone: (949) 833-7800  
Facsimile: (949) 833-7878  
5

6 Attorneys for Petitioner California Transportation Ventures, Inc.  
7

8 BEFORE THE CALIFORNIA  
9 STATE WATER RESOURCES CONTROL BOARD  
10

11 In the Matter of California Regional Water Quality)  
Control Board, San Diego Region, )  
12 Notice of Violation No. R9-2007-0090 and )  
Investigative Order No. R9-2007-0092, )

13 CALIFORNIA TRANSPORTATION )  
14 VENTURES, INC., GENERAL PARTNER OF )  
SOUTH BAY EXPRESSWAY, L.P. )  
15 )  
16 )

16 Petitioner, )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

**PROOF OF SERVICE OF REQUEST FOR  
STAY AND DECLARATION OF DAVID  
HAWLEY**

1 **PROOF OF SERVICE**

2 The undersigned declares:

3 I am employed in the County of Orange, State of California. I am over the age of 18 and  
4 am not a party to the within action; my business address is c/o Nossaman, Guthner, Knox &  
Elliott, LLP, 18101 Von Karman Avenue, Suite 1800, Irvine, CA 91212.

5 On July 2, 2007, I served the foregoing **REQUEST FOR STAY; DECLARATION OF DAVID**  
6 **HAWLEY IN SUPPORT OF PETITION TO THE STATE WATER RESOURCES CONTROL**  
7 **BOARD PURSUANT TO WATER CODE SECTION 13320 AND 23 CAL. CODE REGS.**  
8 **SECTION 2050 FROM A NOTICE OF VIOLATION AND INVESTIGATIVE ORDER ISSUED**  
9 **BY THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO**  
10 **REGION** on parties to the within action by placing ( ) the original (X) a true copy thereof  
11 enclosed in a sealed envelope, addressed as shown below.

9 State Water Resources Control Board  
10 Office of Chief Counsel  
11 Attn: Jeannette L. Bashaw  
12 Legal Secretary  
13 1001 "I" Street, 22nd Floor  
14 Sacramento, CA 95814  
15 jbashaw@waterboards.ca.gov

California Regional Water Quality  
Control Board, San Diego Region  
Attn: Christina Arias  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123-4340  
carias@waterboards.ca.gov

(Via E-Mail and U.S. Mail)

14 (X) (By Electronic Service) By emailing true and correct copies to the persons at the  
15 electronic notification address(es) shown on the accompanying service list. The  
16 document(s) was/were served electronically and the transmission was reported as  
complete and without error.

17 Executed on July 3, 2007.

18 (X) (STATE) I declare under penalty of perjury under the laws of the State of California that  
19 the foregoing is true and correct.

20   
21 Robin Golder